Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROSEMARY RAHN,

Petitioner,

v.

DRAKE CENTER

Respondent.

Petition for Writ of Certiorari
To The United States Court
of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Does an employee speak about matters of public concern when she:

a. complains that tax dollars raised through a special levy are not being used for their intended purpose;

b. complains that her employer is engaging in defiant and potentially corrupt activities with regard to the future spending of levy funds; and

c. advises the public that a potential patient endangerment situation exists at a public hospital where she is employed.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW. i

TABLE OF CONTENTS. ii

TABLE OF AUTHORITIES. iv

OPINIONS BELOW. vii

JURISDICTIONAL STATEMENT. vii

CONSTITUTIONAL AND STATUTORY FRAMEWORK. . . viii

STATEMENT OF THE CASE. 1

A. Introduction. 1

B. Procedural Background. 4

C. Statement of Facts. 6

ARGUMENT: REASON FOR GRANTING THE WRIT. 9

THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH AUTHORITY FROM THIS COURT AND SETS AN UNACCEPTABLE PRECEDENT WHICH WILL DISCOURAGE EMPLOYEES FROM SPEAKING OUT ON MATTERS ON PUBLIC CONCERN 9

1. The Sixth Circuit has Misapplied Connick. 12

2. Rahn's Speech Regarding How Tax Funds Were Being Spent Related To A Matter Of Public Concern and The Opinion Of The Sixth Circuit Is In Direct And Irreconcilable Conflict With This Court's Decision In Pickering. . . .18

3. Rahn's Statement About Possible Patient Endangerment Relates To A Matter of Public Concern 27

CONCLUSION 29

CERTIFICATE OF SERVICE. 30

APPENDIX. 31

TABLE OF AUTHORITIES

CASES PAGE

Churchill v. Walters,
977 F.2d 1114 (7th Cir. 1992), remanded
_____ U.S. _____,
9 IER Cases 801 (1994) 28

Connick v. Meyers,
461 U.S. 138 (1983) 2,10

Czurlanis v. Albanese,
721 F.2d 98 (3rd Cir. 1983) 18

Davoli v. Frazier,.
493 U. S. 977 (1989). 28

Frazier v. King,
873 F.2d 820 (5th Cir.) cert denied,. . .28

Linhart v. Glatfeltner,
771 F.2d 1004 (7th Cir. 1985) 17

Martinez v. City of Opa-Locka Florida,
971 F.2d 708 (11th Cir. 1992). 26

Mount Healthy City Board of Education v. Doyle,
429 U.S. 274 (1977). 2,11

New York Times Co. v. Sullivan,
379 U.S. 254 (1964) 11

O'Connor v. Stevens,
944 F.2d 905 (1st Cir. 1993) 17,26

Patrick v. Miller,
953 F.2d 1240 (10th Cir. 1992). 26

Pickering v. Bd of Education,
391 U. S. 563 (1968). . . . . passim

Rankin v. McPherson,
483 U.S. 378 (1987) 3,10

Rookard v. Health and Hospitals Corp.,
710 F.2d 41 (2nd Cir. 1983). 3,25

Roth v. United States,
354 U. S. 476 (1957) 10

Shands v. City of Kenneth,
993 F.2d 1337 (7th Cir. 1993) 26

Stroman v. Collection County District,
981 F.2d 152 (4th Cir. 1992). 26

STATUTES

42 U.S.C. §1983. . . . . .passim

28 U.S.C. §1254. vii

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROSEMARY RAHN,

Petitioner,

v.

DRAKE CENTER

Respondent.

Petition for Writ of Certiorari
To The United States Supreme Court

Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully request this Court to grant a writ of certiorari to the United States Court of Appeals for the Sixth Circuit to review its decision entered August 8, 1984 vacating a judgment in Petitioner's favor.

OPINIONS BELOW

The decision of the Sixth Circuit Court of Appeals entered August 8, 1994 is attached hereto as Appendix A.

JURISDICTIONAL STATEMENT

The statutory provision believed to confer jurisdiction on this Court to review the judgment below the writ of certiorari is 28 U.S.C. §1254 which provides that cases in the United States Court of Appeals may be reviewed by the Supreme Court by writ of certiorari.

CONSTITUTIONAL AND STATUTORY FRAMEWORK

The First Amendment to the United States Constitution provides:

> "Congress shall make no law respecting an establishment of religion or free exercise thereof; or the right of the people peaceably to assemble, and to petition the government for redress of grievances."

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitutional and laws,

shall be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

A. Introduction

Twenty five years ago, this Court held that a school teacher's letter to a newspaper criticizing the school board's method of informing taxpayers about the need for additional revenue and its allocation of funds between athletics and academics was speech about a matter of public concern. Pickering v. Bd of Education, 391 U.S. 563 (1968). The Pickering decision is the cornerstone of First Amendment jurisprudence.

Like Mr. Pickering, Petitioner Rosemary Rahn complained about her employer's spending of tax revenues raised through a special election. Like Pickering, she complained about the allocation of those funds between relandscaping Drake Hospital's grounds and providing care for Drake's indigent residents. Like Pickering, Rahn sought

to educate the voting public that their tax dollars were not being spent for their intended use. Rahn went further than Pickering, however, and advised the public that Earl Gilreath, the President of Drake, stated that he would spend $100,000,000 in bond money "any way he wanted."

Despite the nearly identical complaints raised by Pickering and Rahn, in a 2-1 decision, a panel of the Sixth Circuit reversed a judgment in Rahn's favor. The court held that her speech did not relate to matters of public concern. Instead, she was characterized as a "disgruntled employee" who complained only about Drake's "internal office policy."

The decision of the panel is directly at odds with Pickering. It also conflicts with this Court's decisions in Connick v. Meyers, 461 U.S. 138 (1983), Mount Healthy School Bd. v. Doyle,

429 U.S. 274 (1977) and Rankin v. McPherson, 483 U.S. 378 (1978). In addition, the opinion conflicts with the Second Circuit's decision in Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2nd Cir. 1983), where the court held that allegations of waste and corruption at a large municipal hospital obviously involved a matter of public concern.

Absent intervention by the Court, the Sixth Circuit's decision will be cited for the proposition that complaints about improper spending of tax dollars, criticism of potentially corrupt and illegal spending practices, and concerns about patient care at a publicly owned hospital do not relate to matters of public concern.

As outlined more fully below, the panel's decision should be reversed.

B. Procedural Background

Petitioner sued Drake Center pursuant to 42 U.S.C. §1983 on January 11, 1991 for violation of her rights under the First Amendment.

After discovery, Drake Center filed a motion for summary judgment. The motion was denied and the case proceeded to trial.

The case was tried in April of 1992. At the conclusion of the evidence, the United States District Court for the Southern District of Ohio held as a matter of law that Petitioner's speech about the spending of tax monies, possible corruption by Drake management, and the potential for poor care of Drake's indigent patients related to matters of public concern. Because Rahn's speech was not disruptive in any way to the operation of Drake, the district court further concluded that her speech was protected

by the First Amendment. A jury then determined that Rahn was fired because of her speech and returned a verdict in her favor for $71,723. The district court thereafter denied Drake's motion for judgment notwithstanding the verdict and awarded Petitioner fees and costs in the amount of $59,274.

Drake Center appealed the district court's judgment to the United States Court of Appeals for the Sixth Circuit. On August 8, 1994, in a 2-1 decision, the court held that Petitioner's speech did not relate to matters of public concern. Instead, the court held, Petitioner was simply a disgruntled employee complaining about management's competence. The judgment was vacated.

Petitioner then filed a petition for rehearing en banc in the Sixth Circuit. That

request was denied on December 7, 1994. Petitioner sought and obtained an extension of time until April 6, 1995 to file her petition.

C. Statement of Facts

Petitioner Rosemary Rahn is a nurse who worked at Drake Hospital, a County owned and operated long-term care facility, for about seven years.

In May of 1989, a special tax levy to raise funds to save Drake Hospital was put on the ballot. Rahn, who was concerned about Drake's continued existence, worked to support the levy. She and other voters were never told that if the levy passed, the operation of Drake Hospital would be turned over to a private corporation, Drake Center. The levy passed, and Drake Center took over the operation of the County owned

hospital on July 1, 1989.

On July 18, 1989, acting as the Chairperson for the Committee to Maintain and Improve Drake Hospital, Rahn delivered a press release to local public officials and the media which was critical of the way Earl Gilreath, the President of Drake Center, was running the facility. Rahn questioned Gilreath's spending of tax monies raised through the special levy for Drake Hospital. She noted that tax levy funds were used to create a new "private" organization, Drake Center, which was viewed by Gilreath as beyond the public's scrutiny. She complained that Gilreath was spending taxpayer dollars on relandscaping the grounds at Drake instead of on care for Drake's indigent patients. She voiced concern that Gilreath threatened to spend the bond funds "any way I want to," and that rather

than maintaining Drake Hospital for the poor, Gilreath planned to change the patient mix and relocate 75% of Drake's existing indigent patients to make room for private patients. Rahn also stated that because of high absenteeism by the staff, a possible patient endangerment situated existed. She was critical of other aspects of the administration, including its failure to provide short and long range goals for the hospital, and its failure to seek input from staff, patients, their families and the citizens of Hamilton County. (Slip Opinion at 7-9). She sought an open meeting of County officials, and representatives of the University of Cincinnati, which was involved in the creation and operation of Drake Center to address and resolve the Committee's concerns.

On July 21, 1989, three days after her

speech, Rahn was sent a letter by courier advising her that she violated Drake Center's attendance policy. On July 25, 1989, she was fired.

Rahn filed suit in district court, alleging that Drake fired her in violation of her First Amendment rights. As noted above, the district court held that Rahn's speech was protected and the jury determined that Rahn was fired because of her speech.

ARGUMENT: REASON FOR GRANTING THE WRIT

THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH AUTHORITY FROM THIS COURT AND SETS AN UNACCEPTABLE PRECEDENT WHICH WILL DISCOURAGE EMPLOYEES FROM SPEAKING OUT ON MATTERS OF PUBLIC CONCERN

This Court has made it clear that the state cannot discharge employees on a basis that

infringes upon their interest in freedom of speech. Rankin v. McPherson, 483 U.S. 378, 383 (1983). In a long line of cases, the Court has stated and reiterated the principle that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Connick v. Meyers, 461 U.S. 138, 145 citing Roth v. United States, 354 U.S. 476, 484 (1957). As noted by the Court, speech on public issues occupies the "highest rung on the hierarchy of First Amendment values" and is entitled to "special protection." Id. at 145. "The inappropriate or controversial character of a statement is irrelevant to the question of whether it deals with a matter of public concern." Rankin v. McPherson, 483 U.S. 378, 387 (1987). As the Rankin Court observed:

> "Debate on public issues should be uninhibited, robust, and wide-open. . . and may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials.

Id. at 387, citing New York Times Co. v. Sullivan, 379 U.S. 254, 270 (1964). The right to be free of retaliation under the First Amendment protection is so important that even erroneous and false statements are protected, provided the employee did not act with a reckless disregard for the truth. Pickering v. Bd. of Education, 391 U.S. 563, 574 (1968). This Court has held that a teacher's statement about a school board's dress code published to a local radio station related to a matter of public concern. Mount Healthy School Board v. Doyle, 429 U.S. 274 (1977). The Court has also held that an employee's statement that she hoped an the next

assassination attempt of President Reagan was successful was of public concern. Rankin, supra. These cases demonstrate the Court's adherence to the principle that debate on public matters should not be stifled.

Here, no less than Pickering, Doyle, Rankin, Rahn spoke as a citizen concerned about political and social issues important to the public that had no bearing on her personal employment situation.

1. The Sixth Circuit Has Misapplied Connick

The test to determine whether speech is about a matter of public concern was set forth in Connick. When an employee comments as a citizen upon matters of "political, social or other concern to the community," the speech is a matter of public concern. 461 U.S. at 147. When an

employee speaks upon matters of "only personal interest," absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision." Id. (emphasis ours).

In Connick, a prosecutor angered by her supervisor's decision to transfer her to another section of the office, circulated a 14-question petition to co-workers. Thirteen of those questions related solely to internal office policy. One, however, sought input about whether co-workers felt pressured to work on political campaigns. Connick was plainly disgruntled. She complained about her boss. She had a vendetta against him. She turned a personal employment dispute into a "cause celebre." 461 U.S. at 148. Still, the Court held that because one small part of Connick's speech regarding pressure to work on

campaigns related to a matter of public concern, her right to speak out had to be balanced against the employer's interest in its efficient operation.

The majority opinion from the Sixth Circuit accurately stated the law:

> ". . ., if any part of the employee's speech, which contributes to the discharge, relates to matters of public concern, the court must conduct the balancing of interests test set forth in Pickering v. Board of Education, 391 U.S. 563 (1968). See Rankin; 483 U.S. at 384; Connick, 461 U.S. at 149-50.

(Slip Opinion at 10). (emphasis ours). However, the court failed to put Rahn's speech in its proper context. It held that no part of her speech related to matters of public concern. It concluded that Rahn was speaking only as an employee about internal hospital matters. Yet,

the overwhelming evidence was that Rahn was a politically active and civic minded individual whose speech was motivated by a sincere desire to educate the public and insure continuing care for the indigent patients at Drake. Even before her speech, she worked at the polls in May of 1989 to garner support for the Drake Tax Levy. She contacted the County Commissioner's office in early June of 1989 with questions about the new Drake structure. She worked with patients about their concerns after Gilreath announced 75% of them would be transferred. She was concerned that patient care could suffer because of employee absenteeism and poor morale. She chaired the Committee to Maintain Drake Hospital, a group comprised of patients, family members, employees and other interested members of the public.

Rahn was not an employee like Connick with a vendetta. She had no on going employment dispute with Drake. She had not been transferred, disciplined or terminated at the time of her speech. Her job was not in jeopardy. Her speech was not in response to any action taken against her. It was not an afterthought. As an employee, she had nothing to gain by voicing her concerns about the allocation of levy funds, Gilreath's statement about spending bond money any way he wanted; or by serving as the Chair of the Committee. In fact, she recognized that her speech could lead to her termination.

Even if some part of Rahn's speech could be characterized as personal, there is no question that she sought to advise the public, who voted to approve the tax levy, that Gilreath was spending their money on flowers instead of

patient care, and had openly stated that he would spend more bond money any way he wanted. The First Circuit stated the analysis succinctly:

> "Connick requires us to look at the point of the speech in question: was it the employee's point to bring wrongdoing to light? Or to raise other issues of public concern because they are of public concern? Or was the point to further some purely private interest?

O'Connor v. Stevens, 944 F.2d 905, 913 (1st Cir. 1993) citing Linhart v. Glatfeltner, 771 F.2d 1004,1010 (7th Cir. 1985). Reviewing the "content form and context" of Rahn's speech "as revealed by the record," Connick, 461 U.S. at 146-148, leads to the inescapable conclusion that her "point" was to educate the voters, the public, and the local government officials charged with overseeing Drake Hospital about how the hospital was being operated.

In sum, Rahn spoke not as an employee solely about personal matters. Instead, as demonstrated below, and as the district court and as Judge Keith observed in dissent, a substantial portion of Rahn's speech addressed topics which this Court determined in Pickering to be matters of public concern.

2. Rahn's Speech Regarding How Tax Funds Were Being Spent Related To A Matter Of Public Concern and the Opinion Of The Sixth Circuit Is In Direct And Irreconcilable Conflict With This Court's Decision In Pickering

The "keystone of any inquiry relating to the free speech rights of employees is the Supreme Court's decision in Pickering v. Board of Education, 391 U.S. 563 (1968)." Czurlanis v. Albanese, 721 F.2d 98 (3rd Cir. 1983). In Pickering, a teacher wrote a letter to the editor of a local newspaper. The Court described the

teacher's letter as:

> ". . . basically an attack on the School Board's handling of the 1961 bond issue proposals and its subsequent allocation of financial resources between the school's educational and athletic programs. It also charged the superintendent of schools with attempting to prevent teachers in the district from opposing or criticizing the proposed bond issue."

Id. at 566). Pickering also complained about the school board's "method of informing taxpayers about the need for additional revenue." Id. at 569-70. The Court held Pickering's letter was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate." 391 U.S. at 571-572. The Court also noted that speech by employees serves an important role:

> ". . . the question whether a school system requires additional funds is a matter of legitimate public concern on which the judgment of the school administration, including the School Board, cannot in a society that leaves such questions to popular vote, be taken as conclusive. On such a question, free and open debate is vital to informed decision by the electorate. Teachers are, as a class, most likely to have informed opinions as to how funds allotted to operation of the school should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

Id. at 571-72.

Like Pickering, Rahn spoke about a bond issue and the way the funds were spent:

> "Mr. Gilreath has gathered "his" people in the administration to attain his personal desires for the direction of the County

hospital, which has historically served the needs of County residents in need of long-term rehabilitation and care. Contrary to this long-standing purpose of the County hospital, Gilreath has been heard to say, "I'll use that $100,000,000 bond issue over the next five years any way I want to." . . .

Mr. Gilreath and his assistant Michael Bradford perceive the "New Drake" as a "Private Hospital" which is not subject to the scrutiny of citizens of Hamilton County who have just voted in a $20,000,000 per year bond levy for the next five years. The question is, did the citizens vote for a private country-club like facility lavishly landscaped with expensive flowers after Mr. Gilreath had previously ordered all existing plantings removed from the front of the hospital or a facility to provide long-term care and therapy for the more needy citizens of Hamilton County?

Was the voter approval of the

> Bond Levy a mandate to purge all the existing staff and patients at Drake Hospital?
>
> WE HOPE NOT!!!"

(Slip Opinion at 7-8). (emphasis ours).

In the passage quoted above, Rahn raised concerns almost identical to those in Pickering. Both employees spoke about a bond issue. Both complained about the method of informing the public about how the funds would be used, and both complained about the allocation of funds: Pickering spoke about money spent on athletics instead of academics; Rahn complained about money spent on landscaping and flowers instead of patient care. Finally, both Pickering and Rahn used the media to make their concerns known.

Ignoring Pickering, the Sixth Circuit simply stated:

> "Here, the fact that Rahn believed that the money was not being spent in a wise fashion, by itself, is insufficient to find that the press release addressed a matter of public concern."

(Slip Opinion at 12). Yet, Pickering makes it clear that how tax dollars are spent is a matter of public concern. The Drake Tax Levy was a matter decided by popular vote. Like the need for the bond issue in Pickering, the spending of those funds was a subject about which Rahn had an informed opinion and about which the electorate had a right to know. The public voted to use the bond money to save Drake Hospital. Gilreath was using the money for flowers. There was a difference of opinion between Rahn and Gilreath regarding how these funds should be spent and how Drake Hospital should be operated. Addressing this point, the Court in Pickering stated:

> "Certainly an accusation that too much money is being spent on athletics by the administrators of the school system. . . cannot reasonably be regarded as per se detrimental to the district schools. Such an accusation reflects rather a difference of opinion between Pickering and the Board as to the preferable manner of operating the school systems, a difference of opinion that clearly concerns an issue of general public interest."

391 U.S. at 571. (emphasis ours).

Opinions about how tax dollars are spent to operate a public hospital are no less a matter of public concern than opinions about how a school board allocates money between athletics and academics. It is these differing opinions which the First Amendment was designed to foster to bring out about political and social changes. Connick, 461 U.S. at 138. Because of Rahn's speech, the public may think twice about voting

for another levy for Drake Hospital.

In addition, Rahn's speech went beyond whether tax dollars were being "spent wisely." She brought to the public's attention Gilreath's statement, which was never denied, that he was going to spend 100 million dollars of bond money "any way he wanted." The statement can be read to mean that Gilreath was not only acting "unwisely," but potentially, illegally. The latest pronouncement from the Sixth Circuit now has created a direct conflict with the Second Circuit which held in Rookard v. Health and Hospital Corp., 710 F.2d 41 (2nd Cir. 1983) that allegations of corrupt and wasteful practices at a large municipal obviously relate to a matter of public concern.[1]

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[1]Other circuits have followed Pickering and had little difficulty finding that speech generally about the spending of public funds

There is no substantial difference between Rahn's speech and Pickering's speech. The Sixth Circuit has ignored the public concerns raised by Rahn's speech which have already been determined by this Court to be protected.

3. Rahn's Statements About Possible Patient Endangerment Are Matters Of Public Concern

In her press release, Rahn pointed out

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relates to a matter of public concern. See O'Connor v. Stevens, 944 F.2d 905, 915 (1st Cir. 1993)(allegations of improper purchases clearly a matter of public concern); Stroman v. Collection County School District, 981 F.2d 152 (4th Cir. 1992)(allegations of mismanagement of school budget relate to matter of public concern); Shands v. City of Kenneth, 993 F.2d 1337 (7th Cir. 1993)(use of city funds to purchase firefighting equipment is a matter of public concern); Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992)(use of retirement funds to balance budget a matter of public concern); and Martinez v. City of Opa-Locka Florida, 971 F.2d 708 (11th Cir. 1992)(expenditure of funds in violation of City ordinance clearly addresses matter of public concern). The opinion of the Sixth Circuit conflicts with those in other circuits.

that new work rules at Drake caused widespread discontent among the hospital staff which created high absenteeism and a possible situation of patient endangerment. (Slip Opinion at 8). The panel stated there was "no tenable argument" that this was but anything an "employee grievance with new administration." Rahn's statement may reflect some dissatisfaction with the new administration, but the focus of that dissatisfaction was its effect on the patients. An employee concerned only about a personal grievance would not have said anything about the effect of absenteeism on patient care.

As Judge Keith pointed out in his dissent, there should be no question that the quality of care provided to indigent residents at a County-owned and taxpayer funded hospital is a matter of public concern. The "quality of health

care given to any group of people, including, inmates, is a matter of public concern." Frazier v. King, 873 F.2d 820, 825-26 (5th Cir.). cert denied, Davoli v. Frazier, 493 U.S. 977 (1989). In Churchill v. Walters, 977 F.2d 1114 (7th Cir. 1992), vacated and remanded, ____ U. S. _____, 9 IER cases 801 (1994) the Court held:

> "There can be no doubt that when questioning the hospital's violation of state nursing regulations as well as the quality and level of nursing care it provides its patients, the nurse is speaking about matters of public concern."

Id. at 1117. (emphasis ours). In Walters, as here, the nurse complained about short-staff and its potential consequences on patient care.

Moreover, to the extent the panel held that Rahn's concerns a about potentially dangerous situation did not warrant protection

because nothing bad had actually occurred, it erred and created an unacceptable new test. We are aware of no authority from this Court holding that for speech to relate to a matter of public concern, an employee must wait until the corruption, waste or perceived danger actually occurs. Such a requirement would defeat the purpose of encouraging employees who are in a position to see potential dangers and inform the public about them.

CONCLUSION

The Sixth Circuit's decision cannot be reconciled with Connick, Pickering, Doyle, and Rankin. It conflicts with the Second Circuit's decision in Rookard. Rahn's speech was no less deserving of protection than Doyle's complaint about a dress-code, Rankin's remark about the

attempted assassination of President Reagan, or Pickering's letter to the editor. The Sixth Circuit's decision takes away the free speech rights this Court has established time and time again. Speech about the spending of public monies which this Court has held relates to a matter of public concern will no longer be protected in the Sixth Circuit. Petitioner respectfully asks this Court to grant our petition, correct the error of the Sixth Circuit, and vacate the decision below.

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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing document has been served by ordinary U.S. Mail to Robert S. Brown, Esq., of Brown, Cummins & Brown Co., L.P.A., 3500 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202, on this 6th day of April, 1995.

David Torchia

RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 24

ELECTRONIC CITATION: 1994 FED App. 0283P (6th Cir.)
File Name: 94a0283p.06

Nos. 92-4041; 93-3170

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROSEMARY RAHN,
Plaintiff-Appellee,

v.

DRAKE CENTER, INC.,
Defendant-Appellant.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed August 8, 1994

Before: KEITH and NORRIS, Circuit Judges; and ZATKOFF, District Judge.*

ZATKOFF, District Judge, delivered the opinion of the court, in which NORRIS, Circuit Judge, joined. KEITH, Circuit Judge (pp. 18-20), delivered a separate dissenting opinion.

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*The Honorable Lawrence P. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

ZATKOFF, District Judge. Defendant-appellant Drake Center, Inc. ("Drake Center") appeals several orders entered by the district court[1] in this 42 U.S.C. § 1983 action where plaintiff-appellee Rosemary Rahn ("Rahn") prevailed on her claim that Drake Center discharged her in violation of her First Amendment rights. Specifically, Drake Center appeals the denial of its directed verdict motion on the issues of state action and protected speech; the denial of its motion for judgment as a matter of law, or in the alternative, motion for a new trial on the issue of its affirmative defenses; the award of punitive damages to Rahn; three separate evidentiary rulings; and the award of attorney fees and costs. Finding that Rahn's First Amendment rights were not violated in this case, we REVERSE the district court and VACATE the judgment entered in this action. We do not reach the merits of the other issues raised in this appeal.

I.

A.

Rahn brought this § 1983 action claiming Drake Center discharged her in violation of her First Amendment rights. After the close of discovery, Drake Center filed a motion for summary judgment which was denied.

A jury returned a verdict in favor of Rahn, awarding her compensatory damages, as well as punitive damages. Judgment was entered on the compensatory damage portion of the verdict, while the district court reserved entry of judgment on the punitive damages until the issue could be fully briefed by the parties. Drake Center filed a motion for judgment as a matter of law, or in the alternative, a motion for a new trial, as well as its opposition to the punitive damage award. The district court denied Drake Center's motion in its entirety and entered judgment on the

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[1]The parties consented to a final determination by a United States Magistrate Judge pursuant to 28 U.S.C. § 636(c).

punitive damages award. Drake Center timely appealed (No. 92-4041). Thereafter, the district court entered judgment awarding Rahn attorney fees in the amount of $56,244.00 and costs in the amount of $3,059.59. Drake Center timely appealed this judgment (No. 93-3170). The appeals were consolidated.[2]

B.

In order to provide a proper context within which to discuss Rahn's claim that her First Amendment rights were violated, the following background is required. Prior to 1989, Daniel Drake Memorial Hospital ("DDMH"), a hospital established pursuant to Ohio Revised Code Chapter 339, was a public institution owned and operated by Hamilton County, a political subdivision of the State of Ohio. DDMH employed Rahn as a licensed practical nurse starting in 1982. In February 1988, DDMH hired a new administrator, Earl Gilreath ("Gilreath"), to institute major changes necessary to regain the hospital's accreditation and Medicare certification, which were lost in January and February 1988, in the wake of the "Donald Harvey incident."[3] DDMH obtained its reaccreditation and Medicare certification while Gilreath was the administrator.

In 1989, Hamilton County decided to cease operating DDMH and to lease the facilities to a private corporation pursuant to O.R.C. § 140.45. Gilreath was instrumental in orchestrating the change. Drake Center is a private nonprofit Ohio corporation, which was created on May 17, 1989. On June 2, 1989, Hamilton County and the

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[2]Drake Center's appeal of the award of attorney fees and costs is based upon their success in the appeal on the merits. Drake Center does not otherwise dispute the award of attorney fees and costs.

[3]Donald Harvey was a former nurse's aide who admitted to killing 24 patients at DDMH in 1987. Without its medicare certification, DDMH was not able to admit seriously ill patients which comprised a majority of DDMH's admissions.

University of Cincinnati entered into a written agreement which provided for the continued operation of the DDMH facilities through a lease of the facilities to Drake Center and set forth the obligations of the parties. Sections 3.1 and 3.2 of the agreement provided that Hamilton County would agree to use its best efforts to pass the "Drake Hospital tax levy" in the Spring, 1989 (which was eventually passed) and to annually transfer the proceeds of the levy to Drake Center subject to the lease and operating agreement between Hamilton County and Drake Center.[4]

Gilreath was appointed the president of Drake Center and Chief Executive Officer. Gilreath assigned to Michael Costa, Drake Center's Vice President of Human Resources, responsibility for all personnel decisions, including hiring, disciplining, and firing employees, except the medical staff and the officers reporting directly to the President of the Board of Trustees. Rahn applied for and obtained the position of licensed practical nurse with Drake Center effective July 1, 1989.

Effective July 1, 1989, Drake Center established a three month orientation period for all of its employees, including all former DDMH employees it hired. Drake Center's Orientation Policy provided that "employees who accumulate three points (as specified in the attendance guide) will have employment terminated." Under the terms of Drake Center's Attendance Policy, employees with an unscheduled absence for one day are assessed one point. When employees do not give proper notice of such absence,[5] they are assessed two points. The section of the Attendance Policy titled "Absent No Show No Call" states

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[4]Hamilton County and Drake Center also entered into the lease and operating agreement on June 2, 1989, providing that effective July 1, 1989, Hamilton County would lease the DDMH facilities to Drake Center.

[5]Proper notice requires that the employee give notice at least one hour before the scheduled shift.

that "a failure to report an absence for the entire scheduled shift shall be dealt with as a serious issue under the disciplinary policy."

On July 18, 1989, Rahn was assessed one point under the attendance policy for an unscheduled absence. According to the schedule that was printed on July 12, 1989 -- for the period July 16, 1989 through August 12, 1989 -- Rahn was scheduled to work the day shift on July 21, 1989. The day shift is 7:00 in the morning to 3:30 in the afternoon. On July 21, 1989, Rahn was assessed two points under the attendance policy for being absent from work without proper notice. Costa had the following written notice delivered to Rahn by courier at approximately 4:00 p.m. on July 21, 1989:

> The purpose of this letter is to advise you that you have accumulated three points for an unscheduled absence on July 19, 1989 [sic], and being absent without notice on July 21, 1989. Unscheduled absences and being absent without call can cause a problem delivering patient care. It is for this reason that employees in orientation who accumulate three points will have employment terminated. You were advised of Drake Center's orientation guideline on July 10, 1989.
>
> Please advise me or the Director of Nursing of any extenuating circumstances for which you should not be terminated under Drake Center's orientation guidelines as soon as possible but, no later than noon on July 22, 1989.

Rahn informed Drake Center, on July 22, 1989, that she was not aware that she had been scheduled to work on July 21, 1989. On July 25, 1989, Costa and Rahn discussed, via telephone, her failure to appear. Rahn again stated that she was not aware that she was scheduled to work and Costa responded that it was Rahn's responsibility to check the schedule.

On July 26, 1989, Costa directed a letter to Rahn, which included the following statements:

> The reason you gave for the July 21, absence, was that you didn't know you were scheduled [to work]. The schedule was posted July 12, you worked July 17, 1989. As you indicated, you realize that you are responsible for knowing your schedule. . . . The orientation guidelines indicate that an employee in orientation who receives three (3) points, will be terminated. Your employment is therefore terminated.

C.

In 1989, Rahn worked at voting polls supporting the tax levy for the then Hamilton County operated DDMH. The tax levy passed. On July 1, 1989 an article appeared in a local newspaper quoting Gilreath as saying he intended to move 75% of Drake Center's patients to private facilities. Sometime after the publication of this article, a group known as the "Committee to Maintain and Improve Drake Hospital" ("the Committee") was formed. The group consisted of employees, patients, patients' family members, and local citizens. Rahn was the Chairperson of the Committee.

On July 18, 1989, the Committee prepared a press release to distribute to the University of Cincinnati, the Administrators of Hamilton County, Gilreath, and the media. Rahn delivered the typed press release at DDMH at approximately 3:30 p.m. on July 18, 1989.[6] The press release reads as follows:

> Today, Rosemary Rahn, chairman of a committee including Drake Hospital Staff Members, Drake Hospital Patients, Families of Drake Hospital Patients and Citizens of Hamilton

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[6]Rahn was scheduled to work on July 18, 1989.

County, announced the formation of a committee to preserve the existing human resources, maintain the facility and encourage improvement at the "County Hospital."

The Donald Harvey incident and subsequent discreditation of the hospital by Medicare and Medicaid authorities has left the hospital in disarray. Adding fuel to the fire of confusion and discontent has been the appointment by Hamilton County Commissioners of Earl Gilreath to resolve the discreditation problem and to spearhead the passing of the most recent bond issue. To give the "Devil" his due, Mr. Gilreath attained the recreditation of Drake Hospital and the passing of the most recent bond issue. However, Mr. Gilreath and his assistant Michael Bradford's strong arm and closed door tactics in the operation of the hospital at this time must be exposed to the glare of sunshine.

Mr. Gilreath has gathered "his" people in the administration to attain his personal desires for the direction of the County hospital, which has historically served the needs of County residents in need of long-term rehabilitation and care. Contrary to this long-standing purpose of the County hospital, Gilreath has been heard to say, "I'll use that $100,000,000 bond issue money over the next five years any way I want to." Further, he has said, "I've built a wall between the University of Cincinnati and Drake Hospital--they will only be sending patients and residents to the County Hospital." He has intimated he will maintain complete control over Drake along with the help of his carefully selected henchmen.

Mr. Gilreath and his assistant Michael Bradford perceive the "New Drake" as a "Private Hospital" which is not subject to the scrutiny of citizens of Hamilton County who have just voted in a $20,000,000 per year bond levy for the next five years. The question is, did the citizens vote for a private country-club like facility lavishly

landscaped with expensive flowers after Mr. Gilreath had previously ordered all existing plantings removed for the front of his hospital or a facility to provide long-term care and therapy for the more needy citizens of Hamilton County?

Was the voters' approval of the Bond Levy a mandate to purge all the existing staff and patients at Drake Hospital. *WE HOPE NOT!!!*

This Committee hopes for clarification and the reasons for actions in the following areas:

(1) New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation.

(2) Failure of the administration to publish the short and long range goals for the hospital and a complete disregard for the input that the hospital staff, patients and relatives and citizens of Hamilton County might have to make.

(3) Failure to disclose the actions and philosophies of the new Hamilton County - University of Cincinnati corporation formed to operate the hospital.

(4) A desire to have specific information about the staffing, budget and desired patient mix provided by the administration instead of glittering generalities and honeycoated, meaningless slogans.

(5) The desecration of employee benefits and retirement funds without counseling with the staff prior to making changes. This move has again created widespread discontent among the hospital staff.

Specific examples of indiscretions of Gilreath and his group are listed in an exhibit attached to this release.

The Committee has made this information available to the new Drake Hospital Board of Directors, Mr. Thomas Wenz, Hamilton County Administrator, Dr. Joseph A. Steger, President of the University of Cincinnati, and Dr. Donald C.

> Harrison, Senior Vice-President, University of Cincinnati Medical Center.
>
> The Committee is calling for an immediate open meeting among the County Commissioners, University of Cincinnati officials, Drake Hospital Administrators, and the Citizens of Hamilton County, Drake Hospital Staff, Drake Hospital Patients and Relations to discuss matters set forth in the press release along with the operating statistics, budget and patient goals of the hospital.
>
> Questions may be directed to the Chairman, Rosemary Rahn, at . . . . Ms. Rahn will attempt to present this press release at Drake Hospital to Administrator Gilreath at 4:30 p.m. today, July 18, 1989, and ask for the Administrator's resignation and a new, progressive, positive and capable Administrator. (emphasis in original).

Rahn also appeared on a local television station's evening news program that night. A jury returned a verdict in favor of Rahn, finding that Drake Center discharged Rahn not because she had accumulated 3 points under the Attendance Policy, but for Rahn exercising her First Amendment rights in the press release.

II.

For the purpose of this appeal, this Court will assume that state action is present. The determination of whether a plaintiff has been terminated for exercising her first amendment right requires a two-step process. *Williams v. Commonwealth of Kentucky*, No. 93-5222/5656, slip op. at 13 (6th Cir. May 26, 1994). "The threshold inquiry is whether the speech that [plaintiff] cites as the basis for her removal and discharge may be fairly characterized as constituting speech on a matter of public concern." *Id.* at 13 (quoting in part *Rankin v. McPherson*, 483 U.S. 378, 384 (1987)) (internal quotation marks omitted). *See also Connick v. Myers*, 461 U.S. 138, 146 (1983). Whether a plaintiff's speech addresses a matter of public concern is a question of law, requiring de novo review by this Court.

Barnes v. McDowell, 848 F.2d 725, 733 (6th Cir. 1988). If a plaintiff's speech did not address a matter of public concern, no further inquiry is necessary. *Id.*

However, if any part of an employee's speech, which contributes to the discharge, relates to matters of public concern, the court must conduct a balancing of interests test as set forth in *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See Rankin*, 483 U.S. at 384; *Connick*, 461 U.S. at 149-50. The court, as part of the ultimate issue of whether the speech is protected, is required to:

> "balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968); *Connick v. Myers*, 461 U.S. 138, 140 (1983). This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibiting speech." *Pickering*, 391 U.S. at 574. Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of the employee's speech.

Rankin, 483 U.S. at 384.

Here, Drake Center's sole attack is on whether the press release addressed a matter of public concern.[7] The determination of whether Rahn's statements contained in the press release addressed matters of public concern must be based on the content, form, and context of the statement, as revealed by the whole record. *Id.* at 146-48. In order to qualify as addressing a matter of public concern, this court must be able to fairly characterize the expression as relating to any matter of political, social, or other concern to the community. *Id.* In addition, the entire speech of the employee does not have to address matters of public concern, as long as some portion of the speech touches upon matters of public concern. *Connick*, 461 U.S. at 149.

The complete record in this appeal reveals that the press release does not touch upon matters of public concern. The crux of Rahn's argument is that the public was presented with a tax levy to help support DDMH when it was purely a public institution. After the levy passed, a private corporation, Drake Center, was formed to manage DDMH. As stated by plaintiff's counsel during oral arguments, Drake Center, the private entity, never would have come into existence without the tax levy being passed. And now Gilreath was going to spend the taxpayers money any way he wanted, and not necessarily in the best interest of the taxpayers. In addition, Rahn contends because the press release addressed "patient endangerment" that it addressed a matter of public concern.

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[7]At trial, Drake Center argued even if the press release touched upon a matter of public concern that Drake Center discharged Rahn due to the accumulation of 3 points under the Attendance Policy. Thus, Drake Center did not argue at the trial level, or on appeal, that under the *Pickering* balancing test its interest in operating the hospital outweighed Rahn's interest in making the statement. As noted above, the jury found that Drake Center discharged Rahn because of the press release and not because she had accumulated 3 points under the Attendance Policy.

This Court in *Barnes v. McDowell*, 848 F.2d 725 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989), cited with approval *Murray v. Gardner*, 741 F.2d 434 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1050 (1985), where the District of Columbia Circuit held that since matters involving public monies and government efficiency may be raised in connection with virtually any public employment matter, they could not be used to convert an issue into one of public concern within the stricture of *Connick*.

> We agree with the District of Columbia Circuit's in *Murray*. The mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed to a matter of public concern.

Barnes, 848 F.2d at 734.

Here, the fact that Rahn believed that the money was not being spent in a wise fashion, by itself, is insufficient to find that the press release addressed a matter of public concern. In addition, the reference to "patient endangerment" does not make this a matter of public concern under the facts in this case. The only mention of patient endangerment in the press release is located in the following paragraph: "New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation." The focus of this comment is not on patient endangerment arising from the misapplication of tax dollars; rather, the focus is on the employees' discontent with new *work* rules which *might* lead to a patient endangerment situation. This is "nothing more than [an] example[] of the quintessential employee beef:

management has acted incompetently." *Barnes*, 848 F.2d at 735.[8]

The conclusion that the press release did not touch upon matters of public concern also is not changed by the fact that the statement was made in a press release or that a local television station interviewed Rahn. In *Matulin v. Village of Lodi*, 862 F.2d 609 (6th Cir. 1988), this Court held that statements made by a public employee which were printed in a newspaper were deserving of First Amendment protection because, in part, the media covered the story and as a consequence the employee's statement touched upon a matter of public concern. *Id.* at 613. The *Matulin* Court reasoned that although the employee may have a personal stake in the substance of the interview, the "finding of public concern is . . . strengthened by the fact that the plaintiff did not solicit the attention of the media, but simply responded to questions regarding an existing controversy." *Id.* Unlike the plaintiff in *Matulin*, who was contacted by a newspaper and did not herself initiate the interview, Rahn issued the press release to the media in an attempt to obtain media exposure when she delivered it to DDMH in the afternoon of July 18, 1989. Under these

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[8]Rahn relies on *Monsanto v. Quinn*, 674 F.2d 990 (3rd Cir. 1982) in support of her position that possible patient endangerment is a matter of public concern. *Monsanto*, however, is easily and significantly distinguishable from the instant appeal. In *Monsanto*, an employee of the tax division of the Virgin Islands wrote several letters to the head of the tax division. At least one of the letters stated that several employees of the tax division had attempted to defraud the government by filing fraudulent tax returns. The employee claimed that these problems in the tax division were impairing the effectiveness of the division's tax-collecting operations. *Id.* at 991. The Third Circuit held that the letters touched upon matters of public concern, because they exposed corruption and inefficiency.

Here, on the other hand, the press release did not disclose any fraud being committed. In addition, the press release speculated that the new work rules might create a possible patient endangerment situation. The press release did not state that a patient endangerment situation existed at the present moment. Therefore, Rahn's reliance on *Monsanto* does not change this Court's conclusion.

circumstances, the fact that a local television station reported the issuance of the press release on its local news that night, does not change the conclusion that the press release did not touch upon a matter of public concern, because Rahn initiated the contact with the media.

Moreover, this is not a case where the public employee has "uncovered" a fraud being committed on the taxpayers. *Cf. Solomon v. Royal Oak Twp.*, 842 F.2d 862, 865 (6th Cir. 1988) ("This Court has held that speech *disclosing* public corruption is a matter of public interest and therefore deserves constitutional protection.") (citations omitted) (emphasis added). The relationship between Hamilton County, University of Cincinnati, and Drake Center was the subject of various newspaper articles before the press release was issued. In addition, the fact that Gilreath sought to make 75% of the beds private also was disclosed in an earlier newspaper article. Therefore, the press release did not "disclose" any public corruption. The public was aware of the facts.

During oral argument, counsel for Rahn stated that Rahn was exposing corruption because the landscaping contracts were awarded to the Administrator's wife. The press release, however, did not mention this. The press release merely stated that new landscaping had been done at the hospital and questioned whether this was money well spent. There is no evidence linking any of the allegations to corruption at Drake Center. As the *Barnes* Court noted:

> While Thompson may have been justified in his beliefs that his section of the Business Enterprises Program did not receive enough of the operating budget, that the Program should have had a 24-hour repair deadline before he instituted one and *that the wisdom and propriety of some of the Program's purchasing practices was questionable, he presented no evidence linking any of these charges to corruption in the Bureau or in the Program.* Consequently, instead of having addressed a matter of public concern, Thompson's

> complaints appear to be nothing more than examples "of the quintessential employee beef: management has acted incompetently."

Id. at 734 (citation omitted) (emphasis added).[9]

As was the case in *Barnes*, the press release before this Court is most accurately characterized as an employee grievance concerning internal office policy. This is best illustrated by examining the five areas on which the Committee sought clarification. The first area was "New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patient endangerment situation." There is no tenable argument that this is anything else besides an employee grievance with the new administration. The second area addressed the "[f]ailure of the administration to publish the short and long range goals for the hospital and a complete disregard for the input that the hospital staff, patients and relatives and citizens of Hamilton County might have to make." Again, the key here is the lack of input from the hospital staff on the goals of the hospital. It can always be claimed that the citizens might wish to have some input on the goals of the public institution. In almost every public employee case brought under the First Amendment, the employee could contend that the public might wish to air their views on the goals of any public institution.

The third area addressed the "[f]ailure to disclose the actions and philosophies of the new Hamilton County - University of Cincinnati corporation formed to operate the hospital [Drake Center]." In this case, this statement is

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[9]The district court held that the press release could fairly be read to support a conclusion that it charged Gilreath with corruption. For the reasons set forth in the text, this Court finds that the press release cannot be fairly read as charging Gilreath with corruption. At best, the press release charges Gilreath with not spending money in a wise fashion with respect to the landscaping of the hospital. This does not constitute a matter of public concern. *See Barnes*, *supra*.

most accurately characterized as the employees complaining about the new administration and the changes in the work rules. The fourth area dealt with "[a] desire to have specific information about the staffing, budget and desired patient mix provided by the administration instead of glittering generalities and honeycoated, meaningless slogans." Again, this statement reflects the employees' dissatisfaction with the new administration and does not touch upon a matter of public concern. Finally, the fifth area the Committee sought clarification on was "[t]he desecration of employee benefits and retirement funds without counseling with the staff prior to making changes. This move has again created widespread discontent among the hospital staff." The fifth area underscores the conclusion that this press release relates to matters of the employees' interest at Drake Center and does not relate to matters of public concern. The overall tone of the five areas of interest in the press release reveal that the press release is an employee grievance, couched in a press release from the "Committee."

Moreover, the press release characterized Gilreath as "the devil" and asked for his resignation "and a new, progressive, positive and capable Administrator [to be named]." This language also supports the conclusion that this press release was actually the quintessential employee beef from disgruntled employees.

Thus, despite Rahn's assertion to the contrary, the press release, while from the Committee, did not address the interest of non-employees with respect to improving DDMH. Rather, Rahn spoke for herself and other employees through the Committee. Finally, the mere fact that the Committee was seeking an open meeting with "the County Commissioners, University of Cincinnati officials, Drake Hospital Administrators, the Citizens of Hamilton County, Drake Hospital Staff, Drake Hospital Patients and Relations" does not change the outcome in this case. In almost any public employee case, the public employee can assert that he or she wishes an open meeting with the governmental agency and the citizens of the local

community to discuss the issues. Thus, this is not very relevant in determining whether this is a matter of public concern.

Thus, this Court finds that the press release did not touch upon a matter of public concern, and therefore was not deserving of First Amendment protection.

III.

Accordingly, we REVERSE the district court and VACATE the judgment entered in this action.

DAMON J. KEITH, Circuit Judge, dissenting. While the majority opinion correctly cites the applicable law in the instant case, I disagree with the conclusion that the speech contained in Rahn's press release was not a matter of public concern. The majority's painstaking consideration of each element of Rahn's press release disregards the impact of the press release as a whole and the context in which it was written. Because the press release addressed a matter of public concern, it is entitled to First Amendment protection. I, therefore, respectfully dissent.

Whether speech addresses a matter of public concern is determined by examining the "intent, form and context of a given statement as revealed by the whole record." *Connick v. Myers*, 461 U.S. 138, 147-48 (1983). Speech addressing matters of public concern encompasses "issues about which information is needed or appropriate to enable the members of society to make informed decisions about the operation of their government." *Id.* at 147.

Here, although the press release noted certain employee grievances, a substantial portion addressed matters of public concern. For example, Rahn's speech attacked the management of Drake Hospital, the local hospital which provided services to the indigent. The attack discussed a recent tax levy that provided funds for Drake Hospital. After the levy was passed, Drake Center corporation was formed to manage Drake Hospital. Rahn's speech directly addressed Drake Center's and Gilreath's use of tax levy dollars to manage the hospital.

As the majority notes, the fact that speech concerns government expenditures and efficiency does not automatically qualify speech as addressing a matter of public concern. *See Barnes v. McDowell*, 848 F.2d 725, 733 (6th Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989). In the instant case, however, the press release discussed the management of Drake Hospital, the formation of the Drake Corporation, and the conversion of 75% of the hospital beds to private status. All of these topics received

substantial media attention in the summer of 1989. They certainly were extremely important to the locality, and are thus worthy of First Amendment protection.

While media coverage itself does not convert a private matter into a matter of public concern, it provides evidence that the matter is of import to the locality. Moreover, the speech also addressed the potential endangerment of patients which is clearly a matter of public concern. *See Frazier v. King*, 873 F.2d 820, 825-26 (5th Cir.) (agreeing "the quality of health care given to any group of people, including inmates, is a matter of public concern"), *cert. denied*, *Davoli v. Frazier*, 493 U.S. 977 (1989); *see Smith v. Cleburne County Hospital*,[1] 870 F.2d 1375, 1383 (8th Cir. 1989), *cert. denied*, 493 U.S. 847 (1989); *see also Casey v. City of Cabool, Mo.*, 12 F.3d 799, 802-03 (8th Cir. 1993) (holding criticism of public officials during a discussion of city policy was a matter of public concern).

Clearly, health care is important to the American public. Perhaps the most important political debate of the 1990's is the interplay between health care and the public's tax dollars. This debate has raged both nationally and locally, and definitely involves matters of public concern.[2]

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[1]Notably in *Cleburne*, the Eighth Circuit determined a doctor's initial criticism of a local hospital was a matter of public concern. *Cleburne*, 870 F.2d at 1381. The court further found, however, that to the extent the speech was personal and spiteful attacks against individuals, it was disruptive and unprotected, and therefore, provided an independent basis for recommending the suspension of the doctor's privileges. *Id.* at 1383-84.

[2]*See also* Symposium, *The Law and Policy of Health Care Rationing: Models and Accountability*, 140 U. Pa. L. Rev. 1505 (May 1992); Susan Elizabeth Powley, *Caring for the Nation -- Current Issues in Health Care Reform*, 45 Vand. L. Rev. 869 (May 1992); Kenneth R. Wing, Symposium, *American Health Policy in the 1980's: The Legal Implications of Health Care Cost Containment*, 36 Case W. Res. L. Rev. 608 (1986); Charles D. Weller, Symposium, *"Free Choice" as a Restraint of Trade in American Health Care Delivery and Insurance*,

Notably, the Third Circuit discussed health care and found that "the quality, availability and cost of health care are among the most important and debated issues of our time." *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 915, 917-19 (3rd Cir. 1990).

The debate over the provision of and payment for health care squarely falls within the heart of the First Amendment. Its protection should extend to the debate on health care reform, even where it occurs at a local level, as in the instant case.

Viewing the intent, form, and context of Rahn's speech as revealed by the whole record, I would conclude the speech was a matter of public concern, and therefore, entitled to protection.

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69 Iowa L. Rev. 1351 (July 1984); David Lauter, *Clinton Challenged on Cost of Health Care to Employers*, L.A. Times, April 8, 1994, at A17; Gerald F. Seib, *Clinton's Choice: Left or Right in Health Care?*, Wall Street Journal, Nov. 24, 1993, at A18; Sara Fritz, *U.S. Cautiously Awaits Clinton Health Program*, L.A. Times, Sept. 19, 1993, at A1; Joseph F. Sullivan, *Health Care Program Endorsed*, New York Times, Nov. 6, 1991, at B6 col. 1.

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NO. 94-1668

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROSEMARY RAHN,

Petitioner,

v.

DRAKE CENTER

Respondent.

Petition for Writ of Certiorari To The United States Court of Appeals for the Sixth Circuit

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SUPPLEMENTAL APPENDIX

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INDEX TO SUPPLEMENTAL APPENDIX

ITEM	PAGE
Decision of District Court Denying Motion for Summary Judgment entered 1/31/92.	1
Decision of District Court Denying Motion for Judgment Notwithstanding verdict entered 8/31/94	64
Certificate of Service	108

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Rosemary Rahn,
Plaintiff

vs Case No. C-1-91-027

Drake Center, Inc.
Defendant

ORDER

This case is before the Court upon defendant Drake Center Inc.'s motion for summary judgment (Doc. 16), plaintiff Rahn's memorandum in opposition (Doc. 19), Drake's reply (Doc. 22), Rahn's supplemental affidavit and documents (Doc. 25), Drake's reply thereto (Doc. 26), and the parties' joint list of disputed and undisputed

facts. (Doc. 23).

Rahn alleges that Drake discharged from her employment in retaliation for the exercise of her First and Fourteenth Amendment rights to free speech, pursuant to 42 U.S.C. § 1983 and the Ohio Constitution, Article I, § 11. She also alleges the state law tort of wrongful discharge. (Doc. 1).

Drake asserts that this Court has no jurisdiction over Rahn's § 1983 claim because her discharge did not constitute state action. Drake also claims no federal rights were violated because Rahn's speech did not involve matters of public concern. Drake further claims that, because no federal claims exist, the Court has no jurisdiction over her state claims. Finally, Drake claims this Court should decline to exercise pendent jurisdiction over Rahn's state

law claims.

Undisputed Facts

The parties have agreed the following facts are disputed.

1. Prior to 1989, Daniel Drake Memorial Hospital (DDMH), a hospital established pursuant to Ohio Revised Code Chapter 339, was a public institution owned and operated by Hamilton County, a political subdivision of the State of Ohio.

2. Plaintiff was employed by DDMH as a Licensed Practical Nurse from 1982 to June 30, 1989.

3. In February 1988, DDMH hired a new Administrator, Earl Gilreath, to institute the major changes necessary to regain the hospital's reaccreditation and Medicare certification, which

were lost in January and February 1988. The hospital subsequently obtained its reaccreditation and Medicare certification while Gilreath was the Administrator.

4. After experiencing various difficulties such as "the Donald Harvey incident" and the loss of the accreditation and Medicare certification the County decided in 1989 to cease operating DDMH and lease its facilities to a private corporation pursuant to O.R.C. § 140.05. Gilreath was instrumental in orchestrating the change.

5. Defendant Drake Center, Inc. is a private nonprofit Ohio corporation, which was created on May 17, 1989. A true and correct copy of Drake's Articles of Incorporation is provided in Doc. 16, Exhibit A, Attachment 1.

6. Effective July 1, 1989, Hamilton County leased the DDMH facilities to Drake.

7. DDMH still exists as a separate legal entity.

8. On June 2, 1989, Hamilton County and the University of Cincinnati (UC) entered into a written agreement that provided for the continued operation of the hospital facilities through a lease of the facilities to a private corporation and set forth the obligations of the parties. A true and correct copy of this agreement is provided in Doc. 16, Exhibit A, Attachment 4. The relevant provisions of this agreement are as follows:

a. Section 1.1 of the agreement states that "the County and the University recognize that, by virtue of the lease of Daniel Drake Memorial Hospital (hereinafter "Hospital) to a private, nonprofit corporation known as "Drake Center, Inc." (hereinafter "Corporation") and by virtue of the agreement by Corporation to operate the Hospital, neither the University nor the County shall have control of the operation of Hospital following

transfer of Hospital Facilities and Hospital Funds to the Corporation. Nevertheless, the parties to this Agreement desire that certain principles apply to the operation of the Hospital and expressly set forth these principles of this Article I. Without attempting to usurp or displace the power, authority or fiduciary obligations of the Board of the Corporation, it is the desire of the parties that the principles contained in this Article I serves as guidelines for the future operation of the Hospital. Both parties agree to make their respective appointments to the Board of the Corporation aware of the guidelines prior to making the appointment."

b. Sections 1.4 and 1.6 state that Drake is free to appoint non-UC physicians to its medical staff and to affiliate with any institution of its choice for educational purposes.

c. In Section 2.1, UC agrees to create Drake.

d. Section 2.1(a) states that Drake's Board of Trustees will be comprised of nine individuals, six of whom are appointed by UC and three of whom are appointed by Hamilton County.

e. In Section 2.2, UC agrees to assign

members of its University Hospital Housestaff (medical school graduates in postgraduate training) to assist in providing medical care to hospital patients.

f. In Section 2.3, UC agrees to assign an adequate number of members of the its College of Medicine faculty to: (a) coordinating teaching and provide supervision of University Hospital Housestaff; (b) perform administrative and supervisory functions for the Hospital as required for accreditation of its facilities; and (c) make clinical knowledge and expertise available to the medical staff, personnel and patients of the Hospital.

g. Section 2.4 states that upon execution of the Lease and Operating Agreement between Hamilton County and Drake, but prior to the transfer of the Hospital Facilities and Funds to Drake, UC agrees to make faculty and employees of its University Medical Center available to the hospital to participate in strategic planning, financial planning, budget development, operational planning and planning for the delivery of medical care and patient care for the continued operation of the hospital.

h. In Section 2.5, UC agrees to provide a chief executive officer, who will

remain a UC employee and be contracted to operate Drake.

i. In Sections 3.1 and 3.2, Hamilton County agrees to use its best efforts to pass the Drake Hospital tax levy in the Spring of 1989 and to annually transfer the proceeds of the Lease and Operating Agreement between Hamilton County and Drake.

j. Section 5.7 provides that obligations of Drake shall not constitute debts of UC, Hamilton County, or the Hamilton County Commissioners unless "expressly made otherwise."

k. Section 1.2 provides that Drake shall be administered, maintained, and operated as a hospital in compliance with the terms of the Lease and perating Agreement. It also states that the hospital facilities or services shall be provided in manner that does not discriminate by reason of race color, religion, sex, age or national origin.

l. Section 1.8 provides that Drake shall provide care to all indigent and medically indigent citizens of Hamilton County who meet its admission criteria to the extent that Drake is reimbursed for the cost of such care by the proceeds of the Drake Hospital tax levy then in effect.

9. On June 2, 1989, pursuant to O.R.C. § 140.05, Hamilton County and Drake entered into a Lease and Operating Agreement to become effective July 1, 1989. A true and correct copy of the Agreement is provided in Doc. 16, Exhibit A, Attachment 6. The pertinent provisions of the Agreement are as follows:

a. Pursuant to Sections 2.3, 2.4 and 2.5, the initial term of the lease is fifty years and it includes an option for Drake to purchase the property outright. Drake leases the hospital premises for one dollar per year.

b. Under Section 2.8, Drake assumes all risk of loss and is responsible for all operational liabilities with respect to the leased premises as of July 1, 1989.

c. Section 5.4 provides that the DDMH employees end their Hamilton County employment on July 1, 1989.

d. Pursuant to Section 5.2(e) and (g), Drake is free to affiliate with any institution of its choice for educational purposes and is not to restrict its medical staff appointments to UC faculty.

e. In Section 1.5, pursuant to O.R.C. Chapter 140, one of the purposes of the Agreement is stated to be to serve the highest public interest in promoting the health and welfare of the citizens of the County and State.

f. Section 5.2(c) requires Drake to maintain the hospital's legal authorization to operate as an Intermediate Care Facility, Skilled Nursing Facility, and Hospital under Ohio law and pursuant to Medicare and Medicaid regulations. Section 5.2(i) requires Drake to provide to all indigent and medically indigent citizens of Hamilton County to the extent it is reimbursed for the cost of such care by the proceeds of the tax levy and to the extent the citizen meets is admission criteria.

g. Section 5.2(k) requires Drake to submit semi-annual and annual reports to the Hamilton County Commissioners to demonstrate that it is in compliance with the terms of the Agreement.

h. Section 8.11 states that Drake's obligations or liabilities, including those arising from operation of the hospital, shall not constitute debts of Hamilton County, DDMH Trustees, or County Commissioners "unless expressly made otherwise."

i. Section 8.12 states that the Agreement is contingent upon the passage of the Drake Hospital tax levy.

10. Pursuant to the aforesaid Agreement, on July 5, 1989, UC contracted with Drake to provide a Chief Executive Officer. A true and correct copy of this contract is set forth in Doc. 19, Appendix 2.

11. Under the July 5, 1989 contract, Earl Gilreath, the former DDMH Administrator, was appointed Drake's President and Chief Executive Office by the Drake Board of Trustees and UC President Joseph Steger. The pertinent provisions of the contract are as follows:

a. Pursuant to Section 1, the President shall be appointed by and accountable to Drake's Board of Trustees for the management and operation of the hospital. Gilreath, as President, shall serve at the pleasure of Drake's Board of Trustees, subject to certain provisions, but shall remain a UC employee while serving the Board of Trustees.

b. Section 2(C) states that Gilreath, as President, shall be responsible for Drake's day-to-day administration and operation. His responsibilities include employment, training, and supervision of all medical and non-medical personnel necessary to manage, staff, operate, and maintain the hospital. He is given discretion to delegate said responsibilities to Drake employees; however, he remains accountable to the Board of Trustees for the fulfillment of these responsibilities.

c. Section 3 states that the manner and amount of the President's compensation and benefits are matters of negotiation between UC and the President. In exchange for the services of the President, Drake shall reimburse UC for a portion of both the President's compensation and the direct costs of his benefits.

d. Section 4(B) authorizes Drake to terminate the President for cause.

12. Gilreath assigned to Michael Costa, Drake's Vice-President of Human Resources, responsibility for all personnel decisions, including hiring, disciplining, and firing

employees, except the medical staff and the officers reporting directly to the President or the Board of Trustees.

13. Drake's Code of Regulations requires that its Board of Trustees consist of nine members - six appointed by UC and three appointed by the Hamilton County Commissioners. Although the Board members are appointed by UC and Hamilton County, the majority are businessmen who have no other affiliation with UC, Hamilton County, or the State of Ohio. A true and correct copy of Drake's Code of Regulations is provided in Doc. 16, Exhibit A, Attachment 2. A true and correct listing of Drake's Board of Trustees is provided in Doc. 16, Exhibit A, Attachment 3.

14. Drake's Board of Trustees has no responsibility for the day-to-day administration of the hospital.

15. Every applicant for employment with Drake, including former DDMH employees has been required to complete Drake's employment application.

16. Plaintiff Rosemary Rahn applied for and obtained the position of Licensed Practical Nurse with Drake effective July 1, 1989.

17. Effective July 1, 1989, Drake established a three month orientation period for all of its employees, including all former DDMH employees it hired. Drake's Orientation Policy provides that "employees who accumulate three points (as specified in the attendance guide) will have employment terminated." Under the terms of Drake's Attendance Policy, employees who have an unscheduled absence for one day are assessed one point. Employees who do not give proper notice of such absence (one hour before

their scheduled shift) are assessed two points. The section of the Attendance Policy titled "Absent No Show No Call" states that "a failure to report an absence for the entire scheduled shift shall be dealt with as a serious issue under the disciplinary policy." A true and correct copy of the Orientation Policy is provided in Doc. 16, Exhibit B, Attachment 1. A true and correct copy of the Attendance Policy is provided in Doc. 19, Appendix 1, Exhibit 3.

18. On July 18, 1989, Rahn was assessed one point under the Attendance Policy for an unscheduled absence.

19. According to the schedule that was printed on July 12, 1989 for the period July 16, 1989 - August 12, 1989, Rahn was scheduled to work the day shift on July 21, 1989. The day shift is 7:00 a.m. to 3:30 p.m.

20. On July 21, 1989, Rahn was assessed two points under the Attendance Policy for being absent from work without proper notice. Costa had the following notice delivered to Rahn by courier at approximately 4:00 p.m. July 21, 1989:

> The purpose of this letter is to advise you that you have accumulated three points for an unscheduled absence on July 19, 1989, and being absent without notice on July 21, 1989. Unscheduled absences and being absent without call can cause a problem delivering patient care. It is for this reason that employees in orientation who accumulate three points will have employment terminated. You were advised of Drake Center's orientation guidelines on July 10, 1989.
>
> Please advise me or the Director of Nursing of any extenuating circumstances for which you should not be terminated under Drake Center's orientation guidelines as soon as possible but, not later than noon on July 22, 1989.

Doc. 16, Exhibit B, Attachment 3.

21. At approximately 9:50 a.m. on July 22,

1989, Rahn contacted Drake and spoke with Brenda Barnard. Rahn told Barnard that she was not aware she had been scheduled to work on July 21, 1989.

22. On July 25, 1989, Costa and Rahn telephonically discussed her failure to appear for work on July 21, 1989. Costa requested that Rahn appear personally at Drake to discuss the situation, and Rahn indicated she could not do so because she was babysitting at her son's house. Costa asserted, based upon other information he possessed, that Rahn was not babysitting. Rahn stated that she had not known she was scheduled to work on July 21, 1989. Costa informed Rahn it was her responsibility to check the schedule.

23. On July 26, 1989, Costa directed a letter to Rahn, which included the following statements:

> The reason you gave for the July 21, absence, was that you didn't know you were scheduled. The schedule was posted July 12, you worked July 17, 1989. As you indicated, you realize that you are responsible for knowing your schedule and I agree with that.
>
> The orientation guidelines indicate that an employee in orientation who receives three (3) points, will be terminated. Your employment is therefore terminated.

Doc. 16, Exhibit B, Attachment 4.

24. Drake discharged eleven other employees pursuant to the Orientation Policy between July 1, 1989 and September 30, 1989.

25. The decision to discharge Rahn was made solely by Costa, Vice President of Human Resources, and Barbara Bussman, Director of Nursing. At the time of Rahn's discharge, Costa and Bussman were employed solely by Drake.

26. Prior to Rahn's discharge, Costa did not consult with or discuss the decision to

discharge her with any of Drake's Trustees, with Drake's President, or with any representatives of Hamilton County, UC or any other public body.

27. During an unspecified time period, Rahn was Chairman of the Committee to Maintain and Improve Drake Hospital. The Committee was comprised of former DDMH employees, past and present Drake employees, Drake patients and family members, and citizens of Hamilton County. The list of committee members attached to its July 19, 1989 press release indicates that there were approximately 100 committee members; however, this number has not been verified with each person included on the list.

28. The Committee issued two press releases concerning Drake and Mr. Gilreath; one dated July 18, 1989 and one dated July 19, 1989. The latter contained three separate releases. The parties

dispute whether Rahn approved the issuance of the handwritten press releases or the handwritten list of complaints in Doc. 16, Exhibit A, Attachments 7 and 9. True and correct copies of these releases are in Doc. 16, Exhibit A, Attachment 7, 8, and 9.

29. Rahn was scheduled to work on July 18, 1989, from 7:00 a.m. to 3:30 p.m. She called in prior to her shift and stated that she would not be present at work that day. She conducted a press conference at Drake that day, during which she requested Gilreath's resignation.

30. At approximately 4:00 p.m. on July 18, 1989, Rahn hand-delivered a version of the July 18, 1989 press release to Linnea Lose of Drake's Public Relations Department. Gilreath was not present at Drake when this press release was delivered, but he subsequently read both the July

18, 1989 and July 19, 1989 press releases.

31. On the evening of July 18, 1989, Rahn appeared on a local news broadcast. Gilreath saw the news broadcast. The parties have not stipulated the contents of the broadcast.

32. Gilreath received a letter from Rahn dated August 1, 1989, in which she indicated her intent to file a grievance regarding her discharge. Gilreath forwarded the letter to the Human Resources Department. No one from Drake replied to this letter.

33. Drake receives approximately 50-55% of its annual budget from the Drake Hospital tax levy.

34. The benefit system at Drake is different from that of DDMH, being governed by Drake policy rather than by statute. A summary of the differences in benefits is provided in

Doc. 16, Exhibit B, Attachment 2.

35. Until its full nine-member Board could be appointed, Drake utilized an interim Board comprised of Joseph Steger, UC President, Donald Harrison, UC Vice President of Medical Affairs, and Thomas Wenz, Hamilton County Administrator. This interim Board governed Drake from July 1, 1989 until September 28, 1989.

36. Dr. Joseph Steger, Chairman of Drake's Board of Trustee, is also President of UC.

37. The stated reason for plaintiff's termination was her accumulation of three points under Drake's Orientation and Attendance Policies.

38. To the best of Drake's knowledge, no one attempted to contact Rahn on the morning of July 21, 1989, to ascertain why she did not appear for work.

39. The Orientation and Attendance Policies under which Rahn was terminated were approved by the interim Board of Trustees, Gilreath and Costa.

40. A representative of Drake contacted Priority One, a courier service, at approximately 2:56 p.m. on July 21, 1989 to request that they deliver a letter dated July 21, 1989 from Costa to Rahn.

41. Rahn neither reported to nor was supervised by Gilreath or Costa.

42. On July 1, 1989, an article appeared in the Cincinnati Post newspaper, stating that Drake was preparing to move 75% of its patients out to nursing homes, hospices or back to their families.

43. To the best of Drake's knowledge, no one contacted Rahn prior to July 21, 1989,

regarding the fact that the schedule that was printed July 12, 1989 was different from the schedule she had worked since January of 1989.

44. The parties agree that a computer or clerical error could have been the reason plaintiff was scheduled to work on July 21, 1989.

45. Mary Lynn, a Registered Nurse, was scheduled to work on July 18, July 25, and July 28, 1989. Lynn had an unexcused absence on July 18, 1989, and was assessed one point under the Attendance Policy. Lynn did not work on July 25, 1989 or July 28, 1989, and Drake's call off sheets do not reflect that she called off work on those days. A true and accurate copy of Lynn's schedule is in Doc. 19, Appendix 1, Exhibit 2. True and accurate copies of Drake's call off sheets for July 18-31, 1989 are in Doc. 19, Appendix 1, Exhibit 10.

46. A recommendation for the discharge of Geraldine Martin for violation of the Attendance Policy was issued on September 15, 1989, but Costa overruled it. A true and accurate copy of the recommendation is in Doc. 19, Appendix 1, Exhibit 11.

In Order To Avoid Summary Judgment, Plaintiff Must Submit Sufficient Evidence To Withstand A Direct Verdict Motion.

A motion for summary judgment should be granted if the evidence submitted to the court demonstrates that there is no genuine issue as to any material fact and that the movant is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56; see Celotex Corp. v. Catreet, 477 U.S. 317,322 (1986); Anderson v. Liberty Lobb, Inc., 477 U.S. 242, 247-48 (1986). The moving party has the burden of showing the absence of

genuine disputes over facts which, under the substantive law governing the issue, might affect the outcome of the action. Celotex Corp., 477 U.S. at 323.

A party may move for summary judgment on the basis that the opposing party will not be able to produce sufficient evidence at trial to withstand a directed verdict motion. In response to a summary judgment motion properly supported by evidence, the non-moving party "is required to present some significant probative evidence which makes it necessary to resolve the parties' differing versions of the dispute at trial." Sixty Ivy Street Corp. v. Alexander, 822 F.2d 1432, 1435 (6th Cir. 1987); Harris v. Adams, 873 F.2d 929, 931 (6th Cir. 1989).

The trial judge's function is not to weigh the evidence and determine the truth of the

matter, but to determine whether there is a genuine factual issue for trial. Anderson, 477 U.S. at 249-50. In so doing, the trial court does not have a duty to search the entire record to establish that there is no material issue of act. Street v. J.C. Bradford & Co., 886 F.2d 1742 (6th Cir. 19889); Frito-Lay, Inc. v. Willoughby, 863 F.2d 1029, 1034 (D.C. Cir. 1988). The court should apply the federal directed verdict standard. Street, 866 F.2d at 1479. The inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that a party must prevail as a matter of law." Anderson, 477 U.S. at 249-50.

If, after an appropriate time for discovery, the opposing party is unable to demonstrate a prima facie case, summary judgment is warranted.

Street, 886 F.2d at 1478 (citing Celotex and Anderson). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986).

Rahn Has Presented Prima Facie Evidence of State Action

Drake contends it did not act under a color of state law when it discharged Rahn. It claims Costa acted in a routine manner without consulting his superiors in effecting the discharge. It asserts there is no evidence tending to show state participation in Rahn's discharge.

Drake relies primarily upon cases where the

issue was whether there was sufficient state participation in a private enterprise to warrant the conclusion that state action occurred. See Burrows v. Ohio High School Athletic Ass'n, 891 F.2d 122 (6th Cir. 1989); Adams v. Vandemark, 855 F.2d 312 (6th Cir. 1988), cert denied, 488 U.S. 1042 (1989); Wagner v. Metropolitan Nashville Airport Authority, 772 F.2d 227 (6th Cir. 1985); Crowder v. Conlan, 740 F.2d 447 (6th Cir. 1984); Bier v. Fleming, 717 F.2d 308 (6th Cir. 1983), cert denied, 465 U.S. 1026 (1984). This line of authority holds that state action is not necessarily present merely because a private entity is funded by the state, see Blum v. Yaretsky, 457 U.S. 991 (1982), or because it is subject to state regulation. See Jackson v. Metropolitan Edison Co., 419 U.S. 345. State action has been found to exist, however, where

there is so close a nexus between the state and the challenged act of an ostensibly private organization that the state can be said to be responsible. Blum, 457 U.S. at 1004; Jackson, 419 U.S. at 351.

This analysis overlooks a preliminary question that must be addressed in this case. Before examining whether there was a state participation in the actions of a private entity, we must determine whether Drake was in fact a private at the time of the events in this case. In deciding whether an entity is public or private, we examine the structure of the entity and its relationship to a governmental unit. Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961); Milo v. Cushing Municipal Hospital, 861 F.2d 1194 (10th Cir. 1988).

In the instant case, Drake was originally a

state entity established pursuant to Ohio Rev. Code Chapter 339. It was known as Daniel Drake Memorial Hospital and was owned and operated by Hamilton County until July 1, 1989. Gilreath was appointed Administrator in February 1988, in an effort to overcome very serious problems existing at DDMH. These problems included criminal and civil litigation and public outcry regarding what the parties have called "the Donald Harvey incident."[1] Harvey, a former nurse's aide at DDMH, on a date not established in this record, admitted to murdering 24 patients there in 1987. Subsequently, in January and February 1988, the hospital's accreditation and Medicare certification were withdrawn.

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[1]Although the parties have submitted little information on the subject, the news article attached as Exhibit 5 to Doc. 16 provides information which, if properly presented at trial, would establish the aforesaid facts.

These and other problems consumed so much of the Hamilton County Commissioners' time that they desired to find a way to have some other entity assume responsibility for operating DDMH. In March 1988, DDMH Administrator Gilreath advised the County Commissioners to "get out of the business" and to approach UC to operate the hospital. (Gilreath Dep., pp. 19-21). UC agreed to operate Drake on the condition that the Drake Tax Levy passed. "That levy had to pass a vote before the University could accept responsibility for the operation of Drake Center." Id., p. 23. No contingency plans were made for DDMH. If the levy did not pass, UC would not take control of DDMH and it would cease to exist. Id., p. 24. In May 1989, the levy passed, guaranteeing Drake twenty million dollars per year for five years. The tax levy constituted about fifty percent of

Drake's revenues. The remainder came from Medicare and Medicaid and occasionally a rare private patient. Id., pp. 24-27.

Hamilton County entered into the lease arrangement with Drake pursuant to Ohio Rev. Code § 140.05. In providing for the lease of public hospital facilities to a "hospital agency" to operate, the Ohio legislature required that the public body granting the lease must determine, and set forth by law, that the lease will promote the public purpose the legislature set forth in § 140.02 and that the lessor (here Hamilton County) will be duly benefitted thereby. Id. The stature requires the lease to provide for limitations on the operation of the hospital by the "hospital agency," including operation and provision of services without discrimination by reason of race, creed, color, or national origin.

Id.

The February 2, 1989 agreement that created Drake (Creation Agreement) was entered into by Hamilton County and UC, both agencies of the state. Pursuant to the agreement, UC must assign members of its Hospital Housestaff to provide medical care at Drake; and it must assign members of its College of Medicine faculty to teach and supervise the Hospital Housestaff at Drake, to perform administrative and supervisory functions at Drake, and to make their expertise available to the Drake staff and patients. UC also agreed to make its faculty and employees available to Drake for strategic and financial planning, budget development, operational planning, and medical and patient care planning prior to transfer of the hospital facilities and funds to Drake. UC further agreed to provide a person to

act as Drake's chief executive officer. This person would remain a UC employee, but would operate Drake hospital. Hamilton County agreed to use its best efforts to pass the 1989 Drake Hospital Tax Levy and to conduct such a levy annually and transfer the proceeds to Drake. The agreement requires Drake to provide medical care to all indigent Hamilton County citizens who meet admission criteria to the extent the cost of such care is reimbursed by the proceeds of the tax levy then in effect.

The Lease and Operating Agreement (Lease) entered into by Hamilton County and Drake on June 2, 19889, has an initial term of fifty years. Drake leases the hospital premises for one dollar per year. The lease contains the same requirements as the Creation Agreement with regard to providing medical care to indigent

citizens of Hamilton County. Drake must submit semiannual reports to the Hamilton County Commissioners to show that it is in compliance with the terms of the Lease. The Lease is made contingent on the passage of the Drake Hospital Tax Levy.

According to Drake's articles of incorporation, only Hamilton County and UC can appoint members of Drake's Board of Trustees. Six of the nine Board members are appointed by UC and three are appointed by Hamilton County. Three initial trustees were appointed in the articles of incorporation, to serve until the first annual meeting or meeting to elect trustees. These were all public officials: UC President Joseph Steger; Dr. Donald Harrison, UC Vice President of Medical Affairs; and Thomas Wenz, Hamilton County Administrator. These public officials

constituted the Drake Board at the time of Rahn's discharge.

On July 5, 1989, Drake and UC entered into an agreement (Management Agreement) whereby Drake agreed to appoint a UC employee to serve as Drake President. This UC employee was to be chosen by the Drake Board, and was subject to final approval by the UC President. The Management Agreement details the duties and responsibilities of Drake's President. It provides that the Drake President shall remain a UC employee and his compensation is to be negotiated with and paid by UC. Drake is to reimburse UC for an unspecified portion of its President's salary, to be negotiated between UC and Drake. While Drake has the right to discharge its President, it may only do so for reasons specified in the Management Agreement, and it must eventually replace him

with another UC employee. In addition to the Management Agreement, there are contracts between various UC departments of medicine and Drake providing for the services of UC medical personnel at Drake. (Gilreath Dep., p. 18).

Pursuant to the Management Agreement, the Drake Board appointed Gilreath, the former DDMH Administrator, as Drake President. In addition to Gilreath, UC employees constitute Drake's medical faculty, physiatrist, and physical medicine and rehabilitation physicians. (Gilreath Dep., pp. 6,7). Gilreath assigned Costa to be responsible for all personnel decisions, excepting medical staff and officers reporting directly to the President or Board.

The aforementioned facts distinguish this case from those cited by Drake in support of its claim that there is no material evidence of state

action. State involvement in the operation of Drake is far more extensive than that in Crowder, 740 F.2d 447. As Gilreath explained in his deposition, the Hamilton County Commissioners approached UC, another state entity, to operate the hospital in their stead in order that they could focus on other Commission matters. UC refused to undertake this responsibility unless the Drake Tax Levy passed, guaranteeing public funds to support the hospital. Two UC officials and one Hamilton County Commissioner, all state officials, made up the Drake board. In Crowder, only two of thirteen board members were public officials. Furthermore, the future makeup of Drake's board is controlled by UC and Hamilton County, both state entities. In Crowder, the initial purchase and lease-back of the hospital was financed by a bond issue, which the hospital

was bound to repay. Here, virtually all of Drake's funding comes from public tax levies and governmental programs. Private patients are virtually non-existent. Drake only pays one dollar per year to lease the premises. Drake has been delegated Hamilton County's obligation of providing health care for its indigent citizens. There is no such indication in Crowder. Drake was the center of widespread public attention and debate during the time in question. There is no such indication in Crowder. Although the hospital in Crowder was subject to extensive state regulation, there was no state involvement in day-to-day hospital operations. Here, a state employee, Gilreath, is the hospital president responsible for day-to-day operations and his duties and responsibilities are controlled by the Management Agreement, to which UC was a party.

UC medical personnel staff Drake.

In Crowder, the Sixth Circuit agreed with the decisions in Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1974) and Hampton v. City of Jacksonville, 304 F.2d 329 (5th Cir.), cert denied, 371 U.S. 911 (1962), by recognizing that state action should be found to exist where there is evidence of significant control over the use of the facility or a substantial role in its day-to-day operations. Crowder, 740 F.2d at 453. In the instant case, despite the trappings of private incorporation, UC employee Gilreath continued to operate Drake for the public benefit in the same fashion as he had for the County Commissioners. Through Gilreath, UC's medical personnel assigned to Drake, and the terms of the Management Agreement, the state controlled Drake's day-to-day operations. The state also

held the purse strings, because Drake was substantially financed by public tax levies and government programs. This is sufficient evidence from which a reasonable juror may find that Drake was in fact a state entity during the pertinent time period.

Assuming, arguendo, that a jury would find Drake to be a private entity, nevertheless there is sufficient evidence from which a reasonable juror could find state action in Rahn's discharge. Under circumstances revealing less state involvement than this case, the federal courts have held that neither leasing to a private entity nor contracting with it for day-to-day management will insulate state actions. Milo, 861 F.2d at 1197; Jatoi v. Hurst-Euless-Bedford Hospital Authority, 807 F.2d 1214, 1221-22 (5th Cir. 1987), cert denied, 484 U.S. 1010

(1988). "The [state] cannot benefit from private management of the hospital and at the same time insulate itself from liability for [improper acts] performed by that manager. The private defendants cannot receive public funds utilize public facilities, and serve a public purpose, yet insist that their private status forestalls any correction of a violation of the constitutional rights of their medical staff." Jatoi, 807 F.2d at 1221-22.

Rahn Has Presented Prima Facie Evidence That She Engaged In Protected Activity

Drake argues that the actions upon which Rahn bases her retaliation claim do not constitute protected speech, because she did not speak out on a matter of public concern.

Rahn's alleged protected activity is as follows. She claims she was concerned about

UC's involvement with Drake and directed a letter to the County Commission for clarification. On July 1, 1989, an article appeared in the Cincinnati Post newspaper indicating Gilreath planned to move seventy-five percent of Drake's patients out of the facility. (Doc. 19, Ex. 5). This news alarmed Rahn and patients' family members. About four hundred persons, consisting of past and current Drake employees and patients' family members and relatives, formed a Committee to Maintain and Improve Drake Hospital. Rahn was the Committee's Chairperson. (Doc. 19, App. 1).

On July 18, 1989, she attempted to present to Gilreath a press release outlining the Committee's concerns. She left the document with Drake's Public Relations Director. Rahn had been scheduled to work that day and "called off work" in accordance with the guidelines and was

assessed one penalty point. She also spoke on television that day and "voiced the concerns in the press release." Id. Rahn denies publishing any document other than the press release (Doc. 19, Ex. 6); thus, there is no other protected activity upon which she bases her claim.

Rahn does not specifically state what information she provided to the television audience, other than as referenced above. In the release, purporting to speak as Committee Chairperson, she stated "[t]he Donald Harvey incident and subsequent discreditation of the hospital by Medicare and Medicaid authorities has left the hospital in disarray." She then criticized Gilreath and his assistant for "strong arm and closed door tactics." She claimed Gilreath perceived Drake as a private hospital not subject to scrutiny of the County citizens

and questioned whether the citizens intended this when they passed the twenty million dollar per year tax levy. She questioned Gilreath's "purge" of existing staff and patients. She requested clarification of five matters: 1) new work rules causing discontent and absenteeism among the hospital staff; 2) failure to publish long and short term goals and disregard of input from staff, patients, relatives and citizens; 3) failure to disclose the "actions and philosophies of the new Hamilton County-University of Cincinnati corporation formed to operate the hospital," 4) a desire for specific information about staffing, budget, etc; 5) the "desecration" of employee benefits and retirement funds without consulting the staff. She called for an open meeting among the County Commissioners, UC officials, Drake administrators, citizens, Drake

staff, Drake patients and relatives to discuss these matters. She also called for Gilreath's resignation and "a new progressive, positive and capable administrator." The release is signed by thirty-ne apparent Committee members. (Doc. 19, Ex. 6).

The crucial issue regarding protected speech is "whether an employee's speech addresses a matter of public concern," an inquiry to be "determined by the content, form, and context of a given statement, as revealed by the whole record." Connick v. Myers, 461 U.S. 138, 147-48 (1983). Thus, every case requires careful scrutiny of the facts surrounding the employee's declaration. The difference between public and private speech has been well-stated by the Ninth Circuit:

> Speech by public employees may be characterized as not of "public

> concern" when it is clear that such speech deals with individual personnel disputes and grievance and that the information would be of no relevance to the public's evaluation of the performance government agencies. . . On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation their government merits the highest degree of first amendment protection.

McKinley v. City of Eloy, 705 F.2d 1110, 114 (9th Cir. 1983)(citations omitted). The D.C. Circuit stated the test even more succinctly: '[T]he role of the whistle-blower merits protection; the expressions of personal dissatisfaction by a discontended employee do not." Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984), cert denied, 470 U.S. 10150 (1985).

Rahn's press release includes elements of both concerns. It reflects her dissatisfaction, as an employee, with Drake's operations and could

be interpreted as a personal vendetta against Gilreath. The mere fact that public monies and efficiency of public servants are the subject of the speech does not, in itself, qualify that speech as being addressed to a matter of public concern. Barnes v. McDowell, 848 F.2d 725, 734 (6th Cir. 1988), cert denied, 488 U.S. 1007 (1989). Were the rules otherwise, a public employee could always shield herself from discipline for speaking out on a private complaint by including reference to such matters.

On the other hand, Rahn's release also seeks to reveal to the public that their substantial tax dollars, voted to operate a hospital for the County indigent, are being used for other purposes. This is a matter that invokes first amendment protection. See Marhonic v. Walker, 800 F.2d 613, 616 (6th Cir. 1986). To the extent

it is possible to read the release as charging corruption by a public official, it deserves protection. Barnes, 848 F.2d at 734. Unquestionably the television station that published Rahn's statements viewed them as matters of sufficient public concern to warrant inclusion in their 5:30 p.m. new broadcasts. Unfortunately, evidence of the specific content of Rahn's broadcast has not been presented to the Court. Nevertheless, the Supreme Court approved a District Court's finding that a public school teacher's telephone call to a radio station regarding the adoption of a dress code at the school, which the station announced as a news item, was "clearly protected by the First Amendment." Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 283 (1977). Additionally, although Rahn has not, at this

stage of the case, provided much detailed background information about the public controversies existing in 1989 regarding Drake, there is enough information present to indicate that activities at Drake were at that time a matter of public concern in Hamilton County, Ohio.

Taking all these matters into consideration, the evidence presently before the Court sufficiently indicates the existence of facts which create a material dispute as to whether Rahn's speech was protected activity. While further development of the facts would be of assistance to the jury in putting Rahn's statements in their proper perspective, whatever that may be, there is presently sufficient evidence from which a jury could conclude her speech was entitled to First Amendment

protection.

Rahn Has Presented Prima Facie Evidence of Retaliation

Drake claims it is entitled to summary judgement because, even if Rahn engaged in protected activity and her discharge was the result of state action, the evidence shows she was discharged for reasons unrelated to her protected activity.

In addition to establishing that Drake was a state actor and her speech was constitutionally protected, Rahn must also prove that the protected speech was a substantial, i.e. a motivating factor in the adverse employment action against her. Mt. Healthy, 429 U.S. at 287; Langford v. Lane, 921 F.2d 677, 680 (6th Cir. 1991) reh'g denied (Feb. 25, 1991).

The parties have presented little, if any,

evidence regarding Rahn's work performance and relationships with Gilreath and Costa prior to July 1989. Starting with an apparent clean slate in July 1989, the record reveals Rahn had no attendance problems prior to the issuance of her press release. It appears she generated substantial support for her Committee. In turn, the Committee was severely critical of Gilreath's administration and publicly called for his resignation. Gilreath admits watching Rahn's speech on television during the 5:30 p.m. news on July 18, 1989. (Gilreath dep., p. 37). Gilreath was also informed by his assistant that day that Rahn had left "a package" at the hospital addressed to the Drake board and the County Commissioners. He opened the package the next day, and found it contained a list of allegations, including misuse of public funds,

etc. Id., pp. 83-43. Gilreath was "frustrated" by Rahn's actions - he felt she was trying to destroy what he had attempted to build up, and he felt he was being tried and convicted in the news media. Id., pp. 43-44. Rahn testified that while she was at Drake on July 18, 1989 to deliver her press release, she saw Costa. Costa, who was aware of her Committee activities asked, "Aren't you supposed to be working today?"

Rahn claims she was not originally scheduled to work on July 21, 1989, but that the schedule had been changed without her knowledge. Drake agrees that a schedule printed July 12, 1989 was different from the schedule Rahn had been working since January 1989. The parties agree than no one advised Rahn of the schedule change, and Rahn admits it was her responsibility to check the posted schedule. The parties also agree that

Rahn's schedule change could have resulted from a computer or clerical error. Because Rahn was not aware of the schedule change, she did not report for work on July 21, 1989. This failure to report earned her two more penalty points, which apparently justified her dismissal pursuant to Drake policy. Upon learning that Drake had not reported for work that day, Costa sent a courier to her house to advise her she was discharged. Costa did not offer Rahn a chance to explain why she was unaware of her schedule, and he did not consider the possibility of clerical or computer error. Rahn claims she immediately attempted to contact Costa and was told he was not available. She asked the nursing office what her status was. They told her she was terminated and should not report for work as scheduled the next day. She claims she attempted to speak to Costa on July

22, 1989, and was told he was not available. She spoke to the nursing office and was told to call back on Monday, July 24, 1989. She claims she called on July 24 and was told Costa was unavailable. On the morning of July 25, 1989, Costa called her at her son's home, where she was babysitting and conducting a Committee meeting. He told her to come to the hospital immediately. She said she could not because she was babysitting. Costa replied that he knew she was having a Committee meeting, that she need not come in, there was nothing to discuss. On July 26, 1989, Costa mailed her a letter confirming her discharge. Doc. 19, App. 1, Ex. 8. Rahn wrote Gilreath on August 1, 1989, advising she was filing a grievance for being discharged for speaking out. He did not reply. Doc. 19, App. 1, Ex. 9.

Rahn alleges other similarly situated employees were treated differently. She claims that Drake excused the absence of Mary Lynn on July 25, 1989 and July 28, 1989 which would have resulted in her accumulation of more than three points under Drake's Attendance Policy. Drake alleges Mary Lynn was not assessed any points on July 25 and July 28, 1989 because her absence were approved beforehand. Rahn claims Drake excused the absence of Geraldine Martin, who accumulated 3.5 points under Drake's Attendance Policy. Drake alleges that Geraldine Martin did not accumulate 3.5 points under the policy because her supervisor incorrectly interpreted the policy and assured Ms. Martin that she would not be assessed pointed for her absences on July 11, 12 and 13, 1989. Since these absences were approved by her supervisor, Ms. Martin was not

assessed any points for them. Thus, there are disputed material facts regarding treatment of similarly situated employees.

The aforementioned facts present a jury question as to whether Rahn was terminated because of her July 18, 1989 press release or because of her attendance record. A material issue for the jury to determine is whether Costa's actions deviated from the normal procedure used to discharge employees with attendance problems. There is also evidence from which a reasonable juror may conclude that Costa discharged Rahn because he considered her a troublemaker or because he thought Gilreath would want him to do so, even though he had not discussed it with Gilreath. Supporting these possible inferences are the timing of the discharge and the fact that Gilreath was Costa's

immediate superior and was "frustrated" by Rahn's press release. Costa gave Rahn no notice prior to discharge and no opportunity to explain her actions. On the same day she allegedly violated the attendance policy, a courier was dispatched to her home to notify her she was discharged. Following her protected activity by only three days this action alone may support an inference of retaliation. See Polk v. Yellow Freight Systems, 876 F.2d 527 (6th Cir. 1989); see also Ratliff v. Wellington Exempted Village Schools Board of Education, 820 F.2d 792 (6th Cir. 1987).

In concluding that Rahn has presented sufficient evidence to establish a prima facie case of retaliation, we express no opinion as to the ultimate outcome of the litigation. There is also substantial evidence supporting Drake's position. We simply believe that, based on the

facts presented, Rahn should not be deprived of her day in court.

Drake Has Failed To Demonstrate That There Is No Material Dispute As To Whether Rahn Would Have Been Discharge In Any Event

Drake alleges that, even if Rahn can establish that she was discharged for protected activity, Drake can prove that Rahn would have been discharged anyway for insubordination.

Once a plaintiff in a free speech case establishes by a preponderance of the evidence that the employer retaliated against her for protected activity, the employer may still prevail if it can establish by a preponderance of the evidence that it would have reached the same decision even in the absence of the protected conduct. Mt. Healthy, 429 U.S. at 287; Langford, 921 F.2d at 680.

Drake claims that "plaintiff's actions were indisputably private and had no other purposes than to cause dissention in the workplace." Doc. 16, p. 15. We have already determined that the press release set forth in Doc. 19, Ex. 6 was not indisputably private. If the jury were to find that it constituted protected activity, a discharge for insubordination based on the press release would not relieve Drake of liability. Since Rahn denies issuing any other materials and contends that other materials are also protected, there is a material factual dispute regarding insubordination.

Because there is conflicting evidence on this issue and because Drake has the burden of proof thereon, summary judgment is not appropriate.

The Court Should Not Exercise Pendent Jurisdiction

Citing numerous similar cases by Judge Weber of this Court, Drake asserts we should decline pendent jurisdiction over Rahn's state claims.

To the extent Rahn's Ohio constitutional claim is identical to the federal constitutional claim, Rahn's rights are secured under the federal aegis. No Ohio court has determined the scope of the Ohio free speech right. To the extent that it may be different from the federal right, this Court is not the appropriate forum to determine that scope. Therefore, pendent jurisdiction over that claim is not warranted.

As regards Rahn's wrongful discharge claim, Ohio law on that issue is still developing and the elements differ from those that make up Rahn's federal claim. Inclusion of the issue in this case could add significant additional

briefing and trial time and could lead to jury confusion. For these reasons, pendent jurisdiction is not warranted.

IT IS THEREFORE ORDERED THAT:

1. Drake's motion for summary judgment on Rahn's 42 U.S.C. § 1983 claim is **DENIED.**

2. Rahn's state law claims are **DISMISSED** without prejudice.

Date: 1/31/92

/s/ Robert A. Steinberg
Robert A. Steinberg
United States Magistrat

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Rosemary Rahn,
Plaintiff

vs Case No. C-1-91-027

Drake Center, Inc.
Defendant

ORDER

This case is before the Court upon plaintiff Rahn's motion for equitable relief (Doc. 60) and defendant Drake Center's renewed directed verdict motion and motion in opposition to the punitive damages award (Doc. 63). These motions follow a jury trial and verdict in Rahn's favor. Rahn alleged that Drake Center discharged her for

exercising her First Amendment rights. The Court determined that Drake Center's discharge of Rahn in July 1989 constituted state action and that her speech, which she alleged motivated the discharge, was protected by the First Amendment. The jury determined that Rahn's speech was a substantial or motivating factor in her discharge, and that she would not have been discharged in the absence of such speech pursuant to Drake Center's attendance policy. The jury found that Drake Center's discharge of Rahn proximately caused $11,723 in the damages, and they assessed punitive damages in the amount of $60,000 against Drake Center.

RAHN'S MOTION FOR EQUITABLE RELIEF IS GRANTED

Rahn requests equitable relief in the form of reinstatement to her employment for the period

from July 21, 1989 through January 4, 1991, for the purpose of requiring Drake Center to make all contributions to the Ohio Public Employees Retirement System that would have been made for that period had Rahn not been discharged. This would result in Rahn accumulating ten years of service under the Retirement System, would increase her current monthly retirement benefit, and would provide her with free health insurance for her lifetime and permit her to purchase health insurance for her spouse at the rate of twenty dollars per month.

Drake Center has not opposed Rahn's motion for injunctive relief, to which she is entitled as a result of the jury's factual findings. See Gutzwiller v. Fenik, 860 F.2d 1317, 1333 (6th Cir. 1988). Therefore, the motion is granted.

DRAKE CENTER'S RENEWED DIRECTED VERDICT MOTION AND MOTION OPPOSING PUNITIVE DAMAGES IS DENIED

There Is Sufficient Evidence To Support The Court's Determination That Drake Center's Discharge of Rahn Constituted State Action

Drake Center renews the directed verdict motion it presented at the close of Rahn's case-in-chief, arguing that Drake Center did not engage in state action when it discharged Rahn. This argument is premised on two assumptions: 1) the facts do not support a finding that Drake Center meets the legal criteria for a state actor, and 2) Rahn's discharge was pursuant to a neutral attendance policy that had no relation to state interests or actions.

As we stated in denying the directed verdict motion at trial, Drake Center is not entitled to Eleventh Amendment immunity. Applying the nine-point test which the Sixth Circuit adopted, see Hall v. Medical College of Ohio at Toledo, 742

F.2d 299, 302-07 (6th Cir. 1984), citing Blake v. Kline, 612 F.2d 718 (3d Cir. 1979), we determine that Drake Center is not an arm or alter ego of the state of Ohio, but is more closely associated with the state's political subdivision, Hamilton County.

As regards state action, the Supreme Court has developed three tests to determine whether the challenged conduct is fairly attributable to the state or its political subdivision: the public function test, the state compulsion test, and the symbiotic relationship or nexus test.

Drake Center Meets The Public Function Test

The public function test requires that Drake exercise powers that are traditionally exclusively reserved to the state. West v. Atkins, 487 U.S. 42, 49-50 (1988); Flaggs Bros.

v. Brooks, 436 149, 157 (1978). Although the Sixth Circuit has ruled that providing mental health services has not been a power that has traditionally been exclusively reserved to the State of Ohio, see Wolotksy v. Huhn, No. 91-3677, 1992 WL 655441 (6th Cir. Mar. 4, 1992), the evidence in this case reveals that in the Cincinnati - Hamilton County, Ohio area, long term mental health care for the needy has traditionally been exclusive governmental function. In 1927, the City of Cincinnati deeded to Hamilton County the land which Drake Center's predecessor occupied with a restriction that it be used for this purpose and a requirement that the land revert back to the city if the restriction is not complied with.

Drake was administered for a long period of time by the Hamilton County Commissioners. In

the late 1980's, the Commissioners encountered very serious problems in operating Drake Center, including criminal and civil litigation and public outcry regarding what the parties have called "the Donald Harvey incident." Harvey, a former nurse's aide at DDMH, admitted to murdering 24 patients there in 1987. Subsequently, the hospital's accreditation and Medicare certification were withdrawn. These and other problems consumed so mucn of the Commissioners' time that they desired to find a way to have some other entity assume responsibility for operating DDMH. The Commissioner's appointed Earl Gilreath, a University of Cincinnati (UC) employee, as DDMH Administrator in February 1988 to help resolve the problems. On Gilreath's advice, the Commissioners requested UC to operate the

hospital. UC is a state entity. UC agreed to do so on the condition that the voters approved the Drake Hospital Tax Levy to fund the hospital's work. In May 1989, the Levy passed, guaranteeing the hospital twenty million dollars per year for five years. In 1989 the Levy constituted about fifty percent of the hospital's revenues. The remainder came from Medicare and Medicaid and occasionally a rare private patient. Id., pp. 24-27. Drake Center was then privately incorporated on May 17, 1989.

In 1989 Drake Center, operated and controlled by state and county organizations, continued to provide the only source of long term mental health care for the indigent in Hamilton County, Ohio. Such care had traditionally been provided in Hamilton County by the City of Cincinnati and then by the County itself.

Gilreath testified that no other place in Hamilton County exists for the indigent to receive such care. Thus, Drake Center meets the public function test.

Drake Center Meets The State Compulsion Test

The state compulsion test requires that a state or its political subdivision exercise such coercive power or provide such significant encouragement that in law the choice of the private actor is deemed to be that of the state. Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Brier v. Fleming, 717 F.2d 308, 311 (6th Cir. 1983), cert denied, 465 U.S. 1026 (1984). The City of Cincinnati's land restriction is an exercise of coercive power as to Drake Center's function. Section 1.5 of the Agreement between Hamilton County and the City of Cincinnati, dated

February 22, 1989, provides that the Drake Center must be operated as an institution for the delivery of hospital and health care services principally for Hamilton County citizens. (Jt. Ex. 4, p. A000264). Section 1.8 of the agreement provides that Drake Center must provide care to all indigent and medically indigent Hamilton county citizens who meet admission criteria to the extent it is reimbursed for the costs of such care by the proceeds of the Drake Hospital Tax Levy. Id. These provisions, in an agreement between a state entity, UC, and the state's political subdivision, Hamilton County, are also an exercise of the state's coercive power over Drake Center.

In July 1989, all of Drake Center's Board Members were appointed either by the state, through UC, or by its political subdivision,

Hamilton County. UC employed Drake Center's President, Gilreath who remained a state employee during his tenure at Drake. Gilreath was required to report semi-annually to the Hamilton County Commissioners. Gilreath formulated Drake Center's personnel policies and decisions, including the decision to adopt the Orientation Policy pursuant to which Rahn was discharged. That policy was approved by Drake Center's Board of Directors and signed by Gilreath. This is further evidence of state compulsion. Wooltsky, at 9.

Drake Meets The Symbiotic Relationship Test

Under the symbiotic relationship or nexus test, the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action

so that the action may be fairly treated as that of the state itself. Jackson v. Metropolitan Edison Co., 419 U.S. 345, 352 (1974). In order for the conduct in question to be attributed to the state, it must be demonstrated that the state is intimately involved in the challenged activity. Wolotsky, at 9; Bier, 717 F.2d at 311. In addition to the factors set forth above, the following evidence of state/county involvement in the challenged conduct, which occurred during 1989, was presented at trial.

Drake paid only one dollar per year to lease the premises.

All Drake Center Board members were state or county officials.

The state and county controlled the future makeup of Drake Center's Board.

Virtually all of Drake Center's funding came

from public funds; private patients and private revenues were virtually non-existent.

A state employee, Gilreath, was in charge of Drake's day-to-day operations. His duties and responsibilities were controlled by the Management Agreement between Drake and UC. Thus, by virtue of his state employment and the management agreement, the state exercised substantial control over Gilreath. UC Medical personnel staffed Drake.

Gilreath believed that a harsh orientation policy was needed to "stop hemorrhaging;" i.e. to correct serious attendance and other problems at Drake Center. He personally participated in drafting the policy and signed it.

Rahn, who was Chairman of the Committee to

Maintain and Improve Drake Hospital, comprised of former DDMH employees, past and present Drake Center employees, patients and their family members, and citizens, issued a press release on July 18, 1989 which is the subject of the case. In the release, Rahn severely criticized Gilreath's operation of Drake Center. She claimed that his work rules caused widespread discontent among the staff, creating high absenteeism and possible patient endangerment. She called for an open meeting with various public officials, and she called for Gilreath's resignation.

Shortly after this speech, Rahn was discharged under unusual circumstances.

The jury found, by a preponderance of the evidence, that Rahn's speech, in writing and

to a television audience, was a substantial or motivating factor in Rahn's discharge. They also found insufficient evidence to prove that Rahn would have been discharged in any event for violation of Drake Center's attendance policy.

The symbiotic relationship or nexus test has been satisfied, based on the jury's findings. They determined that Rahn's criticism of Gilreath's operation of Drake Center was a motivating cause in her discharge and rejected Drake Center's claim that her alleged violation of the attendance policy motivated her discharge. The individual who discharged Rahn was Michael Costa, Vice President of Human Resources and Gilreath's immediate subordinate. Costa had responsibility for implementing the

orientation policy which was the subject of Rahn's critical speech. Thus, the activities of state actors in operating Drake Center were intimately connected with Rahn's discharge.

Drake Center's argument that Rahn's discharge was similar to any other discharge under the orientation policy ignores the jury's findings. Rahn convinced the jury that her discharge was not routine under the orientation policy, but was due to her speech, which criticized Drake Center administration. Drake Center failed to convince the jury that Rahn was discharged for violation of the orientation policy or that her discharge was handled in a routine manner. Therefore, the cases cited by Drake Center in its brief are inapposite.

In finding state action, we rely upon Carnes

v. Parker, 922 F.2d 1506, 1509 (10th Cir. 1991); Milo v. Cushing Mun. Hospital, 861 F.2d 1194 (10th Cir. 1988); and Jatoi v. Hurst-Euless-Bedford Hospital Authority, 807 F.2d 1214 (5th Cir. 1987), cert denied, 484 U.S. 1010 (1988). Our determination is also consistent with the standards for state action set forth in the following Sixth Circuit cases which found absence of state action: Wolotsky, 1992 WL 655441; Adams v. Vandemark, 855 F.2d 312 (6th Cir. 1988); cert denied, 488 U.S. 1042;; Crowder v. Conlan, 740 F.2d 447 (6th Cir. 1984). See also Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964) and Hampton v. City of Jacksonville, 304 F.2d 320 (5th Cir.), cert denied, 371 U.S. 911 (1962), cited with approval inn Crowder.

There Is Sufficient Evidence To Support The Jury's Determination That Drake Center Failed To Establish That Rahn Would Have Been Discharged Due To Her Violation Of Its Orientation Policy

Drake Center argues that it has proved, as a matter of law, that Rahn would have been discharged in any event due to her violations of its attendance policy. Unfortunately, Drake Center cites no authority for the proposition that it has proved this fact "as a matter of law." Although Drake Center fails to so state, it appears to be seeking a judgment notwithstanding the verdict pursuant to Fed. R. Civ. P. 50. Failure to cite authority for its position is reason alone to deny the motion. Local Rules 7.2(a)(1),(b)(1).

The issue raised by a j.n.o.v. motion is whether there was sufficient evidence to raise a question of fact for the jury. O'Neill v.

Kiledjian, 511 F.2d 511, 513 (6th Cir. 1975). In order to prevail on this motion, Drake Center must show that, viewing the evidence in the light most favorable to Rahn and drawing all reasonable inferences in her favor, reasonable jurors could only have found that Rahn would have been discharged under the attendance policy in any event. Chappell v. GTE Products Corp., 803 F.2d 261, 265 (6th Cir. 1986), cert denied, 480 U.S. 919 (987). This Court may not weigh the evidence, pass on the credibility of witnesses or substitute its judgment for that of the jury. Id. See also Erskine v. Consolidated Rail Corp., 814 F.2d 266, 269 (6th Cir. 1987). The fundamental principle in considering a j.n.o.v. motion is "that there must be minimum of interference with the jury." Chappell, 803 F.2d at 265.

There is no dispute that once the jury found that Rahn's speech was a substantial factor in her discharge, the burden of proof shifted to Drake Center to establish that she would have been discharged anyway. See Mt Healthy City School Dist. Bd. v. Doyle, 429 U.S. 274, 287 (1977). There was an abundance of evidence contradicting Drake Center's affirmative defense.

Drake Center argues that Rahn's deposition statement that, if her schedule for July 21, 1989 was not a "fabricated document" she would have been properly terminated, establishes its affirmative defense. It cites no authorities for this proposition. The actual context of Rahn's alleged admission paints a different picture. At her deposition, Rahn stated that she believed the attendance schedule for July 21 to be a "fabricated document." (Rahn Testimony, Vol. 2,

p. 14). Rahn was asked several times by Drake Center's attorney to admit that if the schedule was not fabricated, she was required to be terminated under the attendance policy. Id. Rahn refused several times to agree to this hypothetical question. Id., pp. 14-15. Finally, after the attorney instructed her she had to answer the question, she said "Yes." Id. p. 15

This alleged admission is not binding on Rahn for several reasons. First, she testified at trial that she originally believed that Drake Center altered her work schedule after the July 18 press conference in order to trap her into an attendance violation that would result in her discharge. Id., p. 13. She later changed her mind based on the statement of Donna Bryan, whom Rahn trusted, that the schedule change was an "error." Second, Drake Center was never able to

satisfactorily explain how Rahn's schedule, which had remained the same for a long period of time, became changed after the County Commissioners had instructed Gilreath to address Rahn's concerns (see Pl. Ex. 1) and at about the time she became Chairman of the Committee to Maintain and Improve Drake Hospital. Thus, there is some support in the evidence for Rahn's suspicions about her schedule change. Therefore, the jury would have been justified in finding that Drake Center did not prove the premise of its hypothetical question, i.e. that Rahn's new schedule was not "fabricated." Third, even if the schedule was genuine, Rahn's deposition statement was based on a hypothetical question instead of her personal knowledge and was forced from her despite her repeated attempts to avoid stating her opinion on the subject. Finally, Rahn's "admission" does

not take into account the key issue in this case - whether in practice Drake Center permitted exceptions to the attendance policy.

Drake Center's theory of this case was that a harsh, mandatory attendance policy was adopted during its three months orientation period. Pursuant to this policy, Drake Center asserted, any employee who accumulated three points was "automatically terminated," with "no appeal rights." (Drake Center Memorandum, Doc. 63, pp. 3,4).

This theory was substantially contradicted by the evidence in the case.

The most persuasive evidence disproving Drake Center's theory was the letter Costa delivered to Rahn by courier on July 21, 1989, the date she accumulated her third point. After informing Rahn that employees who accumulate

three points will be terminated, Costa stated, "Please advise me or the Director of Nursing of any extenuating circumstances for which you should not be terminated under Drake Center's orientation guideline as soon as possible, but no later than July 22, 1989." (Jt. Ex. 18). The jury could logically have understood this statement to mean than Rahn would be terminated unless she could demonstrate "extenuating circumstances." The reasonable, logical inference any juror would draw from this letter is that discharge was clearly not "automatic," as alleged by Drake Center's attorneys, but depended on whether extenuating circumstances existed. If discharge were automatic, Costa would have discharged Rahn via the July 21, 1989 letter.

Evidence of employees who were not discharged because extenuating circumstances

existed corroborated the above-described inference. Employee Geraldine Martin accumulated sufficient points under the policy to require termination by September 15, 1989. However, Costa denied the Nursing Director's termination recommendation due to Martin's reliance on a statement by her supervisor. There was conflicting evidence about whether Mary Lynn and Neva Saunders were absent on enough occasions to accumulate the required points for dismissal but were not discharged, and whether an unidentified respiratory therapist accumulated sufficient points for dismissal, but was not dismissed. (Jt. Ex. 37, Def. Ex. E).

In addition, Rahn's dismissal was unusual. There was no evidence that was not a good employee or that she had a poor attendance record. On that day she failed to appear for

work, thus accumulating the third point necessary for discharge, no one contacted her to determine why she was not there. Had someone contacted Rahn on the morning of her absence, she would have been able to come to work, thus avoiding the accumulation of the points necessary for discharge. There was evidence that, on some occasions, employees had called an individual who did not appear for scheduled work to determine why she was not present. Because Rahn's absence affected patient care, the jury may have found it odd that no one checked with her regarding her absence. The situation was made even more unusual by the fact that Costa, on the same day Rahn accumulated her final point, dispatched a courier to her house to advise her of her possible termination. No other employee had been notified of a pending discharge by courier.

Finally, the jury could have considered the timing of the discharge, coming shortly after an unexplained schedule change and her press conference critical of Drake Center' administration. The jury may have found it doubtful that an employer would summarily discharge a competent employee with a good work and attendance record merely because of the employee had accumulated three attendance points. Common sense may have indicated to the jury that another motive was involved. The fact that Rahn's discharge was handled in such an unusual fashion supported the jury's determination that it was due to her protected speech.

The jury's assessment of credibility could also have resulted in its rejection of the affirmative defense. Rahn appeared to be a credible witness, who exhibited a subdued, but

straightforward demeanor. The jury could reasonably have chosen to believe her rather than Drake Center's witnesses, who did not always exhibit such a demeanor. Rahn testified that Costa had told her schedules would not changed under the new plan; she relied on that statement and did not check the posted schedule, assuming her previous schedule to be unchanged; her schedule was changed without her knowledge, perhaps through a clerical or computer error, under circumstances not adequately explained by Drake Center officials; and Rahn thus accumulated the points that Drake relied on to discharge her. The jury had reason to find that Costa's testimony regarding no exceptions to the attendance policy was impeached by other credible evidence in the case, including his own letter to Rahn. The jury could have relied on this

credibility assessment to find that Drake Center had not proven its affirmative defense.

There Is Sufficient Evidence To Support The Court's Determination That Rahn Engaged In Protected Speech

Drake Center in its motion reasserts its trial argument that Rahn did not engage in protected speech.

Rahn claims she was concerned about UC's involvement with Drake Center and directed a letter to the County Commission for clarification. On June 12, 1989, the President of the Board of County Commissioners responded, explaining the operation of Drake Center. He stated he had written Gilreath requesting that Gilreath contact Rahn and take other appropriate steps to be certain that all employees understand the new governing structure. (Pl. Ex. 1). On July 1, 1989, an article appeared in the

Cincinnati Post newspaper indicating Gilreath planned to move seventy-five percent of Drake's patients out of the facility. (Pl. Ex. 2). This news alarmed Rahn and patients' family members. Numerous persons, consisting of past and current Drake employees and patients' family members and relatives, formed a Committee to Maintain and Improve Drake Hospital. Rahn was the Committee's Chairperson.

On July 18, she attempted to present to Gilreath a press release outlining the Committee's concerns. She left the document with Drake Center's Public Relations Director. Rahn had been scheduled to work that day and "called off work" in accordance with the guidelines and was assessed one penalty point. She also spoke on television that day and voiced the concerns in the press release. In the release, purporting to

speak as Committee Chairperson, Rahn stated "[t]he Donald Harvey incident and subsequent discreditation of the hospital by Medicare and Medicaid authorities has left the hospital in disarray." She then criticized Gilreath and his assistant for "strong arm and closed door tactics." She claimed Gilreath perceived Drake Center as a private hospital not subject to scrutiny of the County citizens and questioned whether the citizens intended this when they passed the twenty million dollar per tax levy. She questioned Gilreath's "purge" of existing staff and patients. She requested clarification of five matter: 1) new work rules causing discontent and absenteeism among the hospital staff; 2) failure to publish long and short terms goals and disregard of input from staff, patients, relatives and citizens; 3) failure to

disclose the "actions and philosophies of the new Hamilton County-University of Cincinnati corporation formed to operate the hospital;" 4) a desire for specific information about staffing, budget, etc.; 5) the "discretion" of employee benefits and retirement funds without consulting the staff. She called for an open meeting among the County Commissioners, UC officials Drake Center administrators, staff, patients, relatives and citizens to discuss these matters. She also called for Gilreath's resignation and "a new, progressive, positive and capable administrator." The release is signed by thirty-one apparent Committee members. (Doc. 19, Ex. 6).

The crucial issue regarding protected speech is "whether an employee's speech addresses a matter of public concern," an inquiry to be "determine by the content, form, and context of a

given statement as revealed by the whole record." Connick v. Myers, 461 U.S. 138, 147-48 (1983). Thus, every case requires careful scrutiny of the facts surrounding the employee's declaration. The difference between public and private speech has been well-stated by the Ninth Circuit:

> Speech by public employees may be characterized as not of "public concern" when it is clear that such speech deals with individual personnel disputes and grievances and that the information would be of no relevance to the public's evaluation of the performance of government agencies. . . On the other hand, speech that concerns "issues about which information is needed or appropriate to enable the members of society" to make informed decisions about the operation of their government merits the highest degree of first amendment protection.

McKinley v. City of Eloy, 705 F.2d 110, 114 (9th Cir. 1983)(citations omitted). The D.C. Circuit stated the test even more succinctly: "[T]he role of the whistle-blower merits protection; the

expression of personal dissatisfaction by a discontented employee do not." Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984), cert denied, 470 U.S. 1050 (1985). Rahn's press release includes elements of both concerns. It reflects her dissatisfaction, as an employee, with Drake's operations and could be interpreted as a personal vendetta against Gilreath. The mere fact that public monies and efficiency of public servants are the subject of the speech does not, in itself, qualify that speech as being addressed to a matter of public concern. Barnes v. McDowell, 848 F.2d 725, 734 (6th Cir. 1988) cert denied, 488 U.S. 1007 (1989). Were the rules otherwise, a public employee could always shield herself from discipline for speaking out on a private complaint by including reference to such matters.

On the other hand, a substantial portion of Rahn's release seeks to reveal to the public that their tax dollars, voted to operate a hospital for the County indigent, are being used for other purposes. This is a matter that invokes First Amendment protection. See Marhonic v. Walker, 800 F.2d 613, 616 (6th Cir. 1986). To the extent it is possible to read the release as charging corruption by a public official, it deserves protection. Barnes, 848 F.2d at 734. Unquestionably, the television station that published Rahn's statements viewed them as matters of sufficient public concern to warrant their inclusion in its 5:30 p.m. news broadcast. The Supreme Court has approved a District Court's finding that a public school teacher's telephone call to a radio station regarding the adoption of a dress code at the school, which the station

announced as a news item, was "clearly protected by the First Amendment." Mt Healthy City Board of Education v. Doyle, 429 U.S. 274, 283 (1977). The President of the Board of County Commissioners also viewed Rahn's claims as a matter of public concern and utilized the time and resources of his public office to formally respond to her letter and instructed Gilreath to do so as well. Additionally, although much evidence on this subject was limited by the Court due to Drake Center's objection, there was evidence that the problems at Drake Center were very substantial and a matter of public concern in the summer of 1989. The creation of Drake Center, just two months before Rahn's press release and its subsequent operation, was also a matter of public debate and concern.

Drake Center Is Liable For Punitive Damages

In the same breath that it denies being an arm of the State or County, Drake Center argues it is immune from award of punitive damages, because county taxpayers would have to pay such an award.

Rahn agrees that punitive damages should not be awarded where the award will be satisfied from taxpayer contributions, but argues that there are sufficient private funds available to satisfy the award. She argues that the jury's punitive damage award of $60,000 amounts to less than three percent of Drake's private revenues and does not jeopardize Drake Center's continued operations.

At the time of the events in question, Drake Center was funded almost entirely by public monies. In support of the instant motion,

however, Drake Center filed an affidavit by its President and Chief Executive Officer which reveals that, for the ten months period ending April 30, 1992, 47.68% of Drake Center's funds deprive from county tax levy receipts, 43.44% of its funds derive from Medicare and Medicaid contributions, 5.81% of its funds derive from "other" sources, and 3.07% if its funds derive from "miscellaneous cash receipts." The amount of private funds received by Drake Center during the affidavit period totals $2,304,860.

Assessing punitive damages against a state actor would not serve the purpose of such an award where the damages would not be paid by the officials responsible for the wrongdoing, but would be "visited upon the shoulders of blameless or unknowing taxpayer." City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981).

At common law, although municipalities were treated like private corporations for the purposes of compensatory damages for a wide range of tortious activity, they were considered immune from a punitive damages award. Newport, 453 U.S. at 259-60. The courts at common law had determined that "[c]ompensation was an obligation properly shared by the municipality itself, whereas punishment properly applied only to actual wrongdoers. The courts thus protected the public from unjust punishment, and the municipalities from undue fiscal constraints." Id., at 263.

When the 42nd Congress enacted § 1 of the Civil Rights Act, it chose not to abrogate the municipal immunity from punitive damages. Id., at 264. The legislators were concerned that punitive damages would: 1) "place an unmanageable

financial burden on local governments," and 2) "innocent taxpayers would be unfairly punished for the deeds of persons over whom they had neither knowledge nor control." Id., at 265-66.

This rationale applies equally to state entities such as Hamilton County, Ohio. However, the punitive damage award in this case need not contravene the aforementioned concerns. Drake Center has more than sufficient private revenues to satisfy the jury's $60,000 award. So long as the court specified that said award be paid only from private revenues, none of the aforementioned concerns will be implicated. Furthermore, there is no evidence that payment of the award will result in lack of any services to indigent patients in need of medical attention or would result in the private funds being replaced by public funds.

Drake Center relies upon Bolden v. Southeastern Pennsylvania Transportation Authority (SEPTA), 953 F.2d 807 (3rd Cir. 1991). In Bolden, SEPTA was denied Eleventh Amendment immunity from because it was not considered a state agency, but nevertheless the district court dismissed a punitive damages claim. SEPTA received a larger percentage of private revenues than does Drake Center. The Third Circuit Court Appeals upheld the dismissal because it believed SEPTA "may be analogize to a government entity" for purposes of punitive damages liability. Id., at 830. Because the punitive damages claim was dismissed before the jury's verdict, the court could only speculate about the affect of such an award. The court opined that such an award might result in increased taxes or fares thus punishing the taxpayers and that the deterrent effective

more indirect thus more speculative. The court appeared to be primarily concerned that SEPTA would be a tempting target for large punitive damage awards by juries unduly influenced by SEPTA's size and revenues, "which greatly exceed those of many municipalities." Id., 831.

We believe Bolden to be distinguishable from the instant case and, to the extent it is not, we disagree with its result regarding punitive damages award. SEPTA, the defendant in Bolden, was a far larger entity than Drake Center. It operating funds totaled $554,852,000, Id., at 819 n. 11, while Drake Center's operating funds total $25,953,522.92. Nevertheless, Drake Center's budget certainly qualified as a "deep pocket." More importantly, we do not share the distrust of the jury system inherent in the Third Circuit's speculation that a jury would be tempted by a

defendant's substantial operating funds to render a large punitive damages award. That distrust is not borne out by the verdict in the instant case, which is reasonable and bears a rationale relationship to the facts as found by the jury.

For these reasons, Drake Center is not immune from a punitive damages award.

IT IS THEREFORE ORDERED THAT:

1. Rahn's motion for equitable relief is **GRANTED** and Drake Center is to reinstate her to her previous employment for the period from July 21, 1989 through January 4, 1991, for the sole purpose of Drake Center making contributions to the Ohio Public Employees Retirement System for said period, thereby increasing her retirement benefit, providing her with free health insurance for life and permitting her to purchase health

insurance for her spouse.

2. Drake Center's renewed directed verdict motion on the issues of state action and protected speech is **DENIED.**

3. Drake Center's motion for j.n.o.v. regarding its affirmative defense is **DENIED.**

4. Drake Center is liable to pay the jury award of $60,000 in punitive damages. Said awards must be paid with private revenues only and may not be satisfied through public funds.

Date: 8/27/92

/s/ Robert A. Steinberg
Robert A. Steinberg
United States Magistrate
Judge

CERTIFICATE OF SERVICE

I hereby certify that one copy of the foregoing document has been served by ordinary U.S. Mail to Robert S. Brown, Esq., of Brown, Cummings & Brown, Co., L.P.A., 3500 Carew Tower, 441 Vine Street, Cincinnati, Ohio 45202 on this 25 day of April, 1995.

David Torchia

David Torchia

(3)

Supreme Court, U.S.
FILED
MAY 31 1995

NO. 94-1668

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ROSEMARY RAHN,

Petitioner,

v.

DRAKE CENTER, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT DRAKE CENTER, INC.'S BRIEF IN OPPOSITION TO PETITIONER ROSEMARY RAHN'S PETITION FOR WRIT OF CERTIORARI

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27

QUESTION PRESENTED FOR REVIEW:

Whether, based on the facts of this case, an employee's complaints about a hospital's new management policies, work rules and working conditions are simply a "quintessential employee beef" by a disgruntled employee, and thus not protected speech.

RULE 29.1 STATEMENT

Drake Center, Inc. has no parent company and no corporate subsidiaries.

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW: i

RULE 29.1 STATEMENT ii

TABLE OF AUTHORITIES v

I. INTRODUCTION 1

II. STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 4

III. ARGUMENT: FOLLOWING THIS COURT'S DIRECTIVE IN CONNICK, THE SIXTH CIRCUIT PROPERLY EXAMINED THE *CONTEXT, CONTENT AND FORM* OF RAHN'S SPEECH AND CONCLUDED THAT SHE SPOKE AS AN EMPLOYEE AND NOT AS A PRIVATE CITIZEN. 4

A. THE SIXTH CIRCUIT'S CONCLUSION WAS CORRECT UNDER CONNICK, BECAUSE THE *CONTEXT* OF RAHN'S SPEECH SHOWED THAT SHE SPOKE ONLY AS AN EMPLOYEE. 5

B. THE SIXTH CIRCUIT PROPERLY CONCLUDED THAT THE *CONTENT* OF RAHN'S SPEECH WAS THE "QUINTESSENTIAL EMPLOYEE BEEF" ABOUT MANAGEMENT, AND NOT A MATTER OF PUBLIC CONCERN 9

1. The Five Areas about which the Committee Sought Clarification are Solely Employment-Related Concerns. 9

3. Rahn's Infusion of Popular Interest Buzz Words Were Clearly a Pretext for her own Personal Employment Grievances. 11

4. Rahn's Attempt to Implicate the Expenditure of Public Funds Does Not Provide First Amendment Protection to her Speech. 14

C. THE SIXTH CIRCUIT PROPERLY CONCLUDED THAT RAHN'S SPEECH DID NOT ELEVATE AN EMPLOYEE DISPUTE INTO A MATTER OF PUBLIC CONCERN BECAUSE SHE LABELED IT A "PRESS RELEASE" AND SOUGHT MEDIA COVERAGE. 15

III. CONCLUSION 16

CERTIFICATE OF SERVICE 17

APPENDIX . . . . . A

TABLE OF AUTHORITIES

CASES: **Page**

Barnes v. McDowell, 848 F.2d 725 (6th Cir. 1988), reh'g denied, 1988 U.S. App. LEXIS 11560 (6th Cir. 1988), cert. denied, McDowell v. Barnes, 488 U.S. 1007 (1989) 4, 14, 15

Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987) 7

Connick v. Myers, 461 U.S. 138 (1983) 1, 4, 5, 12

Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983) 10

Davis v. West Community Hospital, 755 F.2d 455 (5th Cir. 1985) 7

Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775 (2d Cir. 1991), cert. denied, 502 U.S. 1013 (1991) 6

Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986) 1, 7, 12

Frazier v. King, 873 F.2d 820, reh'g denied en banc, 878 F.2d 1435 (5th Cir. 1989), cert. denied sub nom, Davoli v. Frazier, 493 U.S. 977 (1989) 8

Gillum v. City of Kerrville, 3 F.3d 117 (5th Cir. 1993), cert. denied, _ U.S. _ , 114 S.Ct. 881 (1994) 12

Gomez v. Texas Dept. of Mental Health & Mental Retardation, 794 F.2d 1018 (5th Cir. 1986) 12

Landrum v. Eastern Kentucky University, 578 F.Supp. 241 (E.D. Ky. 1984) 9

Luck v. Mazzone, 1995 U.S.App. LEXIS 9101 (2d Cir. 1995) 15

Martinez v. City of Opa-Locka, Florida, 971 F.2d 708 (11th Cir. 1992) 8

Matulin v. Village of Lodi, 862 F.2d 609 (6th Cir. 1988) . . 15

McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1982) . . . 8

McMurphy v. City of Flushing, 802 F.2d 191 (6th Cir. 1986) 12

Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977) 10

Murray v. Gardner, 741 F.2d 434 (D.C. Cir. 1984), cert. denied, 470 U.S. 1050 (1985) 14

Noyola v. Texas Department of Human Resources, 846 F.2d 1021 (5th Cir. 1988) 7

O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993), cert. denied sub nom, Town of Nahant v. O'Connor, __ U.S. __, 114 S.Ct. 634 (1993) 7

Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992) 8

Pickering v. Board of Education, 391 U.S. 563 (1968) 2, 5, 13, 15

Rankin v. McPherson, 483 U.S. 378, reh'g denied, 483 U.S. 1056 (1987) 11

Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988) 15

Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2d Cir. 1983) 6

Shands v. City of Kennett, 993 F.2d 1337, reh'g, en banc, denied, 1993 U.S. App. LEXIS 17211 (8th Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 880 (1994) 13, 14

Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1993) 8

CONSTITUTION:

First Amendment 4, 13, 14

I. INTRODUCTION

This is an employment case, not a constitutional case. Respondent Drake Center, Inc. ("Drake Center") is a private corporation[1] which operates a hospital facility in Cincinnati, Ohio. Petitioner Rosemary Rahn, a part-time nurse at that facility was discharged when her absenteeism reached the level of mandatory discharge under Drake Center's attendance policy. Rahn claims she was discharged because she issued a press release that was critical of Drake Center's management and new work rules and conditions at the hospital. In fact, Rahn viciously attacked the management techniques of the hospital administrator, whom she described as "the devil," and other members of the administration, whom she described as "carefully selected henchmen."

On appeal, the Sixth Circuit concluded that Rahn did not engage in protected speech because ***the content, form and context*** of Rahn's press release amounted to nothing more than "quintessential employee beef" by a disgruntled employee. The Sixth Circuit saw through Rahn's self-serving attempts to transform her personal employee grievances into a matter of public concern by "invoking a supposed popular interest in the way public institutions are run." Ferrara v. Mills, 781 F.2d 1508, 1516 (11th Cir. 1986).

That decision is consistent with this Court's recognition in Connick v. Myers, 461 U.S. 138, 147 (1983) that:

> . . . when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, ***a federal court is not the appropriate forum in which to review the wisdom of a personnel decision*** taken

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[1] Drake Center argued in the trial court and in its appeal that Rahn's discharge did not involve state action. For purposes of its decision, however, the Sixth Circuit assumed that state action was present. (Slip Opinion at 9).

> by a public agency allegedly in reaction to the employee's behavior.

(citations omitted)(emphasis added). The Sixth Circuit's decision is also consistent with this Court's decisions in Pickering v. Board of Education, 391 U.S. 563 (1968) and its progeny and the decisions in other circuits. Thus, Rahn's petition should be denied.

II. STATEMENT OF THE CASE

Prior to the formation of Drake Center (a private non-profit corporation) on July 1, 1989, the hospital facility had been owned and operated by Hamilton County, Ohio ("County"). The hospital had lost its accreditation, lost its Medicare certification, and was plagued by a high rate of employee absenteeism. Prior to July 1, 1989, Rahn attended a nurses' meeting at which the hospital administrator, Earl Gilreath, criticized the nurses for not having passed an inspection. Later, Rahn complained to the hospital ombudsman and subsequently to Gilreath, about vacation, staffing and the employment relationship between the nurses and Gilreath.

After the passage of a County tax levy to benefit the hospital, Drake Center, a private non-profit corporation was formed to operate the hospital facility. Employee absenteeism remained a problem, and Drake Center developed a new system for sick days and vacation days and a new attendance policy.[2] Rahn contacted a County commissioner apparently complaining about the new private entity. The commissioner understood that Rahn was only raising employment issues as evident in a letter. He notified Rahn that he had written to Gilreath:

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[2] Rahn's employment was terminated when she accumulated three points under the new attendance policy. (Slip Opinion at 5).

> requesting that he contact you and take other steps as appropriate to make cer[t]ain that ***all employees understand the new governing structure and how it will operate.*** (emphasis added).

On July 18, 1989, prior to her termination, Rahn, Chairman of the "Committee to Maintain and Improve Drake Hospital," issued a press release. Rahn essentially claims that the press release addressed matters of public concern when it alleged the inefficient spending of tax levy money,[3] because that ***somehow*** implied the ***possible*** existence of corruption.[4] She also argues that her statement disclosed possible patient endangerment ***concerns***. However, the purpose of the press release clearly was to seek a response from Drake Center on the following ***employment*** issues: new work rules, short and long range goals, philosophies, staffing, budget, patient mix, employee benefits and retirement funds. After Rahn provided local media with the press release inviting them to her press conference, she was interviewed on the steps of Drake Center by a television station.

Drake Center moved for summary judgment arguing, among other things, that the press release did not address matters of public concern. After the district court denied Drake Center's motion, the case was tried to a jury. The jury returned a verdict for Rahn. The district court later denied Drake Center's Renewed Motion for Judgment as a Matter of Law, or in the Alternative, Motion for New

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[3] Rahn seeks to characterize herself as a concerned citizen by citing her past work for the Drake levy. However, Rahn's work for passage of the levy had an obvious employment motivation: without the levy, the hospital would have closed and Rahn would have lost her job.

[4] Rahn claimed Gilreath had said he was going to spend the taxpayers' money any way he wanted and she thought that the flowers planted outside the hospital were "expensive" and "lavish."

Trial. Drake Center appealed to the Sixth Circuit where the court, without addressing any of the other issues raised in the appeal, found that Rahn's press release did not touch upon a matter of public concern, and therefore was not deserving of First Amendment protection. (Slip Opinion at 17). The Sixth Circuit subsequently denied Rahn's petition for rehearing *en banc*. (See Appendix A).

REASONS FOR DENYING THE WRIT

III. ARGUMENT: FOLLOWING THIS COURT'S DIRECTIVE IN CONNICK, THE SIXTH CIRCUIT PROPERLY EXAMINED THE *CONTEXT, CONTENT AND FORM* OF RAHN'S SPEECH AND CONCLUDED THAT SHE SPOKE AS AN EMPLOYEE AND NOT AS A PRIVATE CITIZEN.

Rahn's press release did not address matters of public concern and therefore is not protected speech. Viewed separately or in context, the press release only reflected Rahn's grievances as a Drake Center employee.

Whether a public employee has been terminated for exercising her first amendment right begins with an analysis of whether the speech may be "fairly characterized as constituting speech on a matter of public concern." Connick, 461 U.S. at 146. Rahn agrees that whether an employee's speech addresses a matter of public concern must be determined by the "***content, form, and context*** of a given statement, as revealed by the whole record." *Id.* at 147-48 (emphasis added). (Respondent's Brief at 17). Speech of a public employee speaking as a citizen upon matters of public concern is entitled to constitutional protection, while speech of a public employee speaking upon matters only of a personal interest is not. *Id.* at 147; Barnes v. McDowell, 848 F.2d 725 (6th Cir.

1988), reh'g denied, 1988 U.S. App. LEXIS 11560 (6th Cir. 1988), cert. denied, McDowell v. Barnes, 488 U.S. 1007 (1989).

Following this Court's directive in Connick, the Sixth Circuit properly concluded that Rahn spoke as a private citizen.

A. THE SIXTH CIRCUIT'S CONCLUSION WAS CORRECT UNDER CONNICK, BECAUSE THE *CONTEXT* OF RAHN'S SPEECH SHOWED THAT SHE SPOKE ONLY AS AN EMPLOYEE.

Rahn's history of complaints about internal hospital policy demonstrate that she spoke only as an employee.

Rahn previously had complained to hospital administration about vacation, staffing and morale. *Supra* at 2-3. In addition, Rahn's inquiries to the county commissioner about the operation and governance of the new private entity, as evidenced by his response to her, demonstrate that she was continuing her complaints as a hospital employee. *Supra* at 3. This Court's decisions and decisions throughout the circuits support the conclusion that, in issuing her press release, Rahn spoke as an employee and not as a private citizen.

The Sixth Circuit's decision conforms to and follows this Court's reasoning in Pickering. In Pickering, the context in which the employee's speech was made clearly indicated that he spoke ***only*** as a private citizen. In Pickering, a proposed increase in the tax rate to be used for educational purposes was defeated by the voters. In connection with a second proposal for a tax increase, a teacher organization and the school board, in articles appearing in the local newspaper, urged passage of the tax increase in order to prevent the decline in the quality of education. In response to those articles, Pickering, a teacher, sent a letter to the editor attacking the school

board's handling of a prior bond issue, attacking the school's allocation of resources between the educational and athletic programs and accusing the superintendent of attempting to prevent teachers from speaking out in opposition to the tax increase. Unlike this case, there was no evidence that Pickering had ever complained about personnel matters and there was nothing in the letter itself to even remotely suggest that the speech related to personnel matters or internal operating policies at the school.

The Sixth Circuit's decision in this case is also in accord with the Second Circuit's opinion in Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2d Cir. 1983), another case cited by Rahn. There, a nurse in a municipal hospital was fired after she brought evidence of malfeasance and corruption to the attention of the hospital's administrators and inspector general. The inspector general's investigation of Rookard's complaints showed that the hospital had in fact been overcharged by a nursing agency and that the hospital's plan to use unlicensed agency nurses clearly violated state rules and regulations. *Id.* at 44. Unlike this case, there was no evidence that Rookard was embroiled in an underlying employment dispute with the hospital or that her substantiated allegations of improper conduct and corruption were a pretext for purely employment-related issues.

In fact, in a number of cases with facts similar to this one, other circuits have reached precisely the same result the Sixth Circuit did here. See, e.g., Ezekwo v. NYC Health & Hospitals Corp., 940 F.2d 775, 781 (2d Cir. 1991), cert. denied, 502 U.S. 1013 (1991)(resident's allegations that the hospital discriminated against her on the basis of her race and gender and her opinions on how to improve the residency program made in the context of her poor evaluation did not address matters of public concern, but rather

were aimed at protecting "her own reputation and individual development as a doctor."); Noyola v. Texas Department of Human Resources, 846 F.2d 1021 (5th Cir. 1988)(welfare services technician's question to his supervisor suggesting a large welfare case load and urging a realignment of his own case load made at a time when his level of performance was being questioned indicated that the technician spoke as an employee rather than in his role as a citizen); Callaway v. Hafeman, 832 F.2d 414 (7th Cir. 1987)(while the incidence of sexual harassment in a public school is inherently a matter of public concern, employee's informal and confidential complaints regarding such conduct were attempts to resolve her private dilemma and thus did not involve matters of public concern); Ferrara v. Mills, 781 F.2d 1508 (11th Cir. 1986)(teachers' objections to school's use of collegiate registration and out-of-field teacher placement motivated by teacher's own inability to control his students and made in the context of the school's denial of teacher's request for course assignments could not be fairly characterized as constituting speech on matters of public concern); Davis v. West Community Hospital, 755 F.2d 455 (5th Cir. 1985)(doctor's complaints to his superiors regarding personal grievances against various co-workers and administrators, comments about patient care and queries about possible conflicts of interest by two hospital board members did not involve any policy or practice of the hospital, were related only to isolated unsubstantiated acts by specific individuals, were made at a time when his own patient records were being scrutinized and did not constitute matters of public concern).[5]

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[5] On the basis of context alone, other cases cited in Rahn's brief are also consistent with the Sixth Circuit's opinion. See, e.g., O'Connor v. Steeves, 994 F.2d 905 (1st Cir. 1993), cert. denied sub nom, Town of Nahant v. O'Connor, __ U.S. __, 114 S.Ct. 634 (1993)(statements by Superintendent of Public Works alleging improprieties by an incumbent elected official made

Given the existence of new work rules and conditions at the hospital and Rahn's prior history of employee complaints to Gilreath and a county commissioner, the context in which her speech was made supports the conclusion that she spoke as an employee and not as a public citizen.

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in the context of a political feud between different factions of a town's Board of Selectman); Stroman v. Colleton County School District, 981 F.2d 152 (4th Cir. 1993)(teacher's letter complaining of school system's method of paying teachers and budgetary mismanagement was written in the context of a public debate over an impending budgetary crisis in the school system and whether public revenue bonds would be necessary); Martinez v. City of Opa-Locka, Florida, 971 F.2d 708 (11th Cir. 1992)(public employee made statements regarding unlawful expenditures of public funds in the context of subpoenaed testimony to the City Commission's Board of Inquiry and statement to an investigator to the State Attorney's Office); Patrick v. Miller, 953 F.2d 1240 (10th Cir. 1992)(in discussing qualified immunity issue, court noted that finance director's opposition to discriminatory employment practices based on race was not addressing employment practices and concerns affecting him directly; director's expressions of concern over use of retirement funds were made in his role as the fund's trustee at a public retirement board meeting); Frazier v. King, 873 F.2d 820, reh'g denied en banc, 878 F.2d 1435 (5th Cir. 1989), cert. denied sub nom, Davoli v. Frazier, 493 U.S. 977 (1989)(state correctional nurse's reports of violations of nursing practices to Department of Corrections and State Board of Nursing addressed matters of public concern and no underlying employment disputes were evident); McKinley v. City of Eloy, 705 F.2d 1110 (9th Cir. 1982)(probationary police officer who was the public representative of the policemen's labor organization had protested at city council meeting council's decision not to give police officers their annual raise and was interviewed by a local television station regarding the dispute between the city and its police officers).

B. THE SIXTH CIRCUIT PROPERLY CONCLUDED THAT THE *CONTENT* OF RAHN'S SPEECH WAS THE "QUINTESSENTIAL EMPLOYEE BEEF" ABOUT MANAGEMENT, AND NOT A MATTER OF PUBLIC CONCERN.

1. The Five Areas about which the Committee Sought Clarification are Solely Employment-Related Concerns.

That the press release was more of the same "employee beef" is confirmed by the substantive content of the speech, particularly the five areas on which the Committee sought action:

1. The purpose of the Committee, which was to "***preserve the existing human resources***, maintain the facility and encourage improvement" at the hospital, is an indication that the press release was directed at employee rather than public issues. (emphasis added).

2. The press release attacked the management techniques of the administrator Gilreath, whom Rahn described as "***the devil***," and called for his replacement. She also described one of the other administrators as engaging in "***strong arm and closed door tactics***." Such complaints can only be described as criticisms about the hospital management and its relationship to the employees. (emphasis added).[6]

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[6] See Landrum v. Eastern Kentucky University, 578 F.Supp. 241, 247 (E.D. Ky. 1984)(professor's criticisms about the operation of university's real estate program, questions about the dean's competence and accusations that the dean was "a Hitler" who frequently lied and used informants dealt with individual disputes and grievances and were of "no relevance to the public's evaluations of governmental agencies.").

3. Criticisms about Gilreath and "***his carefully selected henchman***" and the relationship between the hospital and the University of Cincinnati are simply more complaints about how management would be governing the new hospital. (emphasis added).

4. The press release sought clarification on new work rules that "***caused widespread discontent among the hospital staff*** which has created a high absenteeism, possibly developing a patient endangerment situation." (emphasis added). The ***possibility*** of patient endangerment was an obvious strawman to disguise employee dissatisfaction with more stringent attendance requirements. Clearly, Rahn's focus here was on the new work rules and employee morale.

5. Rahn's critiques of the administration's failure to publish the ***short and long range goals and philosophies*** for the hospital demonstrate that Rahn, as an employee, did not have the input she wanted in the management of the new hospital.

6. Rahn's request for "***specific information about the staffing, budget and desired patient mix***" is simply a request for information of significance to hospital staff and not a matter of interest to the general public. (emphasis added).

7. Finally, Rahn's outcry about the "***desecration of employee benefits and retirement funds***" and the impact on employee morale are also clearly employee issues. (emphasis added).[7]

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[7] Rahn's speech is distinguishable from Czurlanis v. Albanese, 721 F.2d 98, 104 (3d Cir. 1983)(county employee's speech at meeting of county board alleging inefficiency, false reports, duplication and unnecessary work in Division of Motor Vehicles constituted speech on matters of public concern when he did ***not*** discuss his pay, his hours, or the conditions of his employment.") and Mount Healthy City Board of Education v. Doyle, 429

The Sixth Circuit's opinion that these constituted employment related issues, rather that issues of public concern, is consistent with this Court's decision in Rankin v. McPherson, 483 U.S. 378, reh'g denied, 483 U.S. 1056 (1987). In that case, after hearing of an attempt on the President's life, an employee commented to a co-worker, "'if they go for him again, I hope they get him.'" *Id.* at 381. The employee's comments clearly had nothing to do with her job as a clerical worker for a law enforcement officer and related only to her opinion as a private citizen.

In this case, on the other hand, Rahn's complaints dealt only with her disputes and grievances as a Drake Center employee.

3. Rahn's Infusion of Popular Interest Buzz Words Were Clearly a Pretext for her own Personal Employment Grievances.

Rahn's infusion of certain buzz words such as "bond levy" and "patient endangerment"[8] and her request for public meetings

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U.S. 274, 573 (1977)(the only subject of the teacher's complaint, a new dress code policy, was admittedly an issue of public concern where the dress code was prompted by the view of some administration "that there was a relationship between teacher appearance and public support for bond issues.").

[8] Specifically, the Sixth Circuit found that:

> the reference to "patient endangerment" in the press release does not make this a matter of public concern ***under the facts in this case.*** The only mention of patient endangerment in the press release is located in the following paragraph: "New work rules which have caused widespread discontent among the hospital staff which has created a high absenteeism, possibly developing a patent endangerment situation." The focus of this comment is . . . on the employees' discontent with new *work* rules which *might* lead

likewise does not transform her employee concerns into matters of significance to the general public. As the Eleventh Circuit stated in Ferrara v. Mills, 781 F.2d at 1516:

> a public employee may not transform a personal grievance into a matter of public concern by invoking a supposed popular interest in the way public institutions are run.

See also Gillum v. City of Kerrville, 3 F.3d 117 (5th Cir. 1993), cert. denied, _ U.S. _ , 114 S.Ct. 881 (1994)(whether chief of police broke the law was public concern, but was not protected speech because that was not the focus of police officer's speech; his concern was continuing his own investigations when he had been told to provide all information to Internal Affairs); McMurphy v. City of Flushing, 802 F.2d 191 (6th Cir. 1986)(court noted that even plaintiff's express allegations of embezzlement and cover-ups were made out of ***"spite and frustration"*** and had little to do with matters of public concern)(emphasis added)); Gomez v. Texas Dept. of Mental Health & Mental Retardation, 794 F.2d 1018, 1022 (5th Cir. 1986)(state employee's complaints about the length of patient stay at a state center for the mentally ill and retarded did not address matters of public concern even though the employee claimed his statements addressed "the proper treatment of the mentally ill" or the allocation of public funds).

In Connick, the issue of public concern was not just used as a pretext to preface what were otherwise strictly employment issues. An assistant district attorney distributed a questionnaire to her co-

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> to a patient endangerment situation. (emphasis in original).

(Slip Opinion at 12 (emphasis in bold added)).

workers. One of the questions in the questionnaire, positioned with equal magnitude to the other questions, asked whether the co-workers had felt political pressure to work in political campaigns. The district attorney felt that question "would be particularly damaging if discovered by the press." 661 U.S. at 141. The Court found that question ***inherently*** addressed a matter of public concern:

> We have recently noted that official pressure upon employees to work for political candidates not of the worker's own choice constitutes a coercion of belief in violation of fundamental constitutional rights . . . In addition, there is a demonstrated interest in this country that government service should depend upon meritorious performance rather than political service . . . ***Given this history, we believe it apparent that the issue of whether assistant district attorneys are pressured to work in political campaigns is a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal.***

Id. at 149 (emphasis added). However, even given these important interests, under the Pickering balancing test, the employee's discharge did not offend the First Amendment. *Id.* at 154.

In this case, Rahn's speech did not address matters that were of ***inherent*** concern to the public and the Sixth Circuit properly concluded that, ***on the facts of this case***, her references to popular sounding issues did not transform employment-related issues to matters of public concern. (Slip Opinion at 12).

4. Rahn's Attempt to Implicate the Expenditure of Public Funds Does Not Provide First Amendment Protection to her Speech.

None of Rahn's statements alleged corruption -- only a disagreement with Gilreath's authority as Chief Executive and his judgment in landscaping. In Barnes v. McDowell, the Sixth Circuit held "the mere fact that public monies and government efficiency are related to the subject of a public employee's speech do not, by themselves, qualify that speech as being addressed to a matter of public concern." 848 F.2d at 734, citing Murray v. Gardner, 741 F.2d 434, 438 (D.C. Cir. 1984), cert. denied, 470 U.S. 1050 (1985) (FBI employee's complaints about method of layoffs did not involve matters of public concern even though furlough plan involved disposition of public funds and quality of public work force). "Just because the expenditure of public funds is tangentially implicated does not automatically entitle the expression to protection." Barnes, 848 F.2d at 730. The Barnes court noted that:

> while a simple allegation that a public employee's speech disclosed corruption in a public agency satisfies the pleading requirements of the Federal Rules of Civil Procedure, those same rules require that when a defendant has moved for summary judgment, a plaintiff must present ***concrete evidence*** to support the allegation in order to survive the motion.

Id. at 734 (emphasis added).[9]

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[9] On the other hand, in Shands v. City of Kennett, 993 F.2d 1337, reh'g, en banc, denied, 1993 U.S. App. LEXIS 17211 (8th Cir. 1993), cert. denied, __ U.S. __, 114 S.Ct. 880 (1994), a case relied upon by Rahn, is inapplicable to the facts here and does not contradict the Sixth Circuit's decision in this case. In Shands, the Eight Circuit held that the plaintiffs'

The Sixth Circuit properly found that there "is ***no evidence*** linking any of the allegations to corruption at Drake Center." (Slip Opinion at 14-15 (emphasis added), citing Barnes, 848 F.2d at 734).

C. THE SIXTH CIRCUIT PROPERLY CONCLUDED THAT RAHN'S SPEECH DID NOT ELEVATE AN EMPLOYEE DISPUTE INTO A MATTER OF PUBLIC CONCERN BECAUSE SHE LABELED IT A "PRESS RELEASE" AND SOUGHT MEDIA COVERAGE.

Rahn does not dispute the Sixth Circuit's conclusion that it is insignificant that her speech was contained in a "press release" and that she was interviewed by a local television, because it was Rahn who sought the media coverage by issuing the press release. (Slip Opinion at 13-14, citing Matulin v. Village of Lodi, 862 F.2d 609, 613 (6th Cir. 1988)(plaintiff's speech was protected when she participated in an interview ***initiated*** by the newspaper)); see Rode v. Dellarciprete, 845 F.2d 1195 (3d Cir. 1988)(newspaper interview was protected speech when newspaper, ***not*** the employee, sought the interview); and see also Luck v. Mazzone, 1995 U.S.App. LEXIS 9101 (2d Cir. 1995)(public employee's anonymous call to a radio station correcting a news item about the extent of air conditioning in a public building in which she worked was essentially a private complaint).

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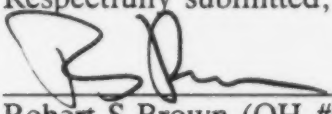
statements concerning the expenditure of public funds for firefighting equipment, the safety of firefighting equipment and the need to hire a person to disconnect gas meters during fires were matters of public concern and not merely a pretext for an employment dispute. Despite these matters of public concern, the appeals court applied the Pickering balancing test and affirmed the lower court's judgment notwithstanding the verdict that the plaintiffs' speech, under the facts of the case, was not protected by the First Amendment.

III. CONCLUSION

The Sixth Circuit correctly decided that Rahn's speech was not a matter of public concern and, under the facts of this case, is not protected speech. The Sixth Circuit's decision conforms to and follows the prior decisions of this Court and those throughout the circuits. Thus, Rahn's petition for a writ of certiorari should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing have been sent to Paul H. Tobias and David G. Torchia, Esq., TOBIAS, KRAUS & TORCHIA, 911 Mercantile Library Building, 414 Walnut Street, Cincinnati, Ohio 45202, Attorney for Plaintiff-Appellee, by ordinary U.S. mail this the 30th day of May, 1995.

Kathryn Khue Przywara

Kathryn Khue Przywara (0043730)

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROSEMARY RAHN,	:	
	:	
Plaintiff-Appellee,	:	
	:	
v.	:	ORDER
	:	
DRAKE CENTER, INC.,	:	
	:	
Defendant-Appellant.	:	

BEFORE: KEITH and NORRIS, Circuit Judges; and ZATKOFF, *District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Keith would grant rehearing for the reasons stated in his dissent.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

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*Hon. Lawrence R. Zatkoff, United States District Judge for the Eastern District of Michigan, sitting by designation.

Court, U.S.
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MAY 30 1995
OFFICE OF THE CLERK

No. 94-1668

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROSEMARY RAHN,

Petitioner,

v.

DRAKE CENTER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* AND BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER ROSEMARY RAHN

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MOTION OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER ROSEMARY RAHN

The National Employment Lawyers Association moves for leave to file the attached Brief *Amicus Curiae* in support of the Petitioner, Rosemary Rahn. Consent to the filing of said brief has been obtained from all parties.

The National Employment Lawyers Association, (hereinafter referred to as "NELA"), is an organization of Plaintiff's Employment Lawyers which consists of approximately 1800 members nationwide. One of the purposes of NELA is to protect and defend the interests of plaintiffs involved in employment disputes including employment discrimination suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, 42 U.S.C. Section 1981 and 42 U.S.C. Section 1983.

NELA is not a party to this suit. However, this case raises issues regarding the type of speech that is pro-

tected by the First Amendment to the United States Constitution under 42 U.S.C. Section 1983. NELA member attorneys represent dozens of plaintiffs similarly situated to Petitioner Rahn herein. As *Amicus Curiae*, NELA respectfully seeks to assist this Court in its understanding of the importance of the issues raised in this case, the consequences of the decision in this case on currently pending employment discrimination cases and the need for hearing by this Court.

In the attached Brief *Amicus Curiae* NELA seeks to demonstrate why this case should be heard by this Court on the following grounds: 1) the importance of the issues raised; 2) the importance of those issues to all public employees in this nation; 3) the inconsistent rulings among the Courts of Appeal.

For the foregoing reasons, this motion for leave to file the attached Brief *Amicus Curiae* should be granted.

Respectfully submitted,

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TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
ARGUMENT	1
Introduction	1
I. This Case Merits Review By This Court Due To The Importance Of The Issues Raised And The Effect Upon Public Employees	2
II. This Case Merits Review By This Court To Resolve Differences In Holdings In Different Courts Of Appeals	8
CONCLUSION	11

TABLE OF AUTHORITIES

	PAGE
Connick v. Myers, 461 U.S. 138 (1983)	5
Givhan v. Western Lines Consolidated School District, 439 U.S. 410 (1979)	9
Greenberg v. Kometko, 811 F.2d 1057 (7th Cir. 1987)	9, 10
Knapp v. Whitaker, 759 F.2d 827 (7th Cir. 1985) .	9
McGill v. Board of Ed. of Pekin Elementary Sch., 602 F.2d 774 (7th Cir. 1979)	8
McLaughlin v. Tilendis, 398 F.2d 287 (7th Cir. 1968)	8
Muller v. Conlisk, 429 F.2d 901 (7th Cir. 1970) ..	8
Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill., 391 U.S. 563 (1968)	1, 2, 3, 4, 5
Rookard v. Health and Hospitals Corp., 710 F.2d 41 (2nd Cir. 1983)	10

IN THE

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ROSEMARY RAHN,

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF THE NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER ROSEMARY RAHN

The National Employment Lawyers Association (NELA) submits this Brief as *Amicus Curiae* contingent upon the granting of the foregoing motion for leave to file said Brief. The interest of the *Amicus Curiae* is stated in that motion.

ARGUMENT

Introduction

NELA adopts the facts as set forth in the Petition for Writ of Certiorari.

In *Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill.*, 391 U.S. 563 (1968), this Court followed the usual approach in First Amendment cases: 1) all persons have the right to freedom of speech; 2) the State can limit that right

for a compelling state reason, 3) any limitations on freedom of speech must be drawn as narrowly as possible. This has become known as the *Pickering* balancing test.

It must be emphasized that this balancing test issue would not be before this Court if this Court grants the Petition because the Respondent did not argue at the District Court level that the Respondent had a compelling reason that justified limiting Plaintiff's speech. (Fn.7, Panel Opinion).

Thus, the issue in this case is whether Plaintiff's speech was protected by the First Amendment to the United States Constitution. In a two to one decision the Court of Appeals determined that the speech was not so protected.

It should also be noted there is little or no dispute as to the actual content of the speech for most of it was contained in a written press release.

I. This Case Merits Review By This Court Due To The Importance Of The Issues Raised And The Effect Upon Public Employees.

In June, 1968, public employees throughout this nation rejoiced, for this Court held the First Amendment protected a public employee's speech on matters of public concern. *Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill.*, 391 U.S. 563 (1968).

On August 8, 1994, the Court of Appeals for the Sixth Circuit, in the two-to-one decision in this case, severely restricted public employees' rights to freedom of speech and, as importantly to *Amicus*, restricted the right of the public to know. The Court of Appeals believed "public concern" is the equivalent to whistle blowing, albeit a

narrow interpretation of whistle blowing, that only those public employees who speak out as whistle blowers exposing *criminal behavior* are entitled to First Amendment protection.

In 1989 Petitioner had worked at the polls supporting a tax levy that provided monies to the Daniel Drake Memorial Hospital (DDMH), a public health care facility caring for the indigent. After the passage of that levy the new administrator at DDMH made certain changes, all of which involved the use of taxpayer monies.

Petitioner then joined the Committee to Maintain and Improve Drake Hospital, became the Chair of the Committee, drafted a press release and held a press conference on behalf of the Committee. The press release was critical of certain acts of the new administration of the hospital—all acts of which implicated taxpayer dollars.

The Court of Appeals held the press release and Plaintiff's public comments were not protected by the First Amendment and, therefore, if Plaintiff were fired for her speech, that was not actionable under 42 U.S.C. Section 1983.

Amicus submits this decision flies directly against the holding in *Pickering v. Board of Ed. of Tp. H.S. Dist. 205, Ill.*, 391 U.S. 563 (1968).

In 1964 Marvin Pickering, a teacher at the Lockport, Illinois, high school, had written a letter to the local newspaper. That letter was highly critical of the school board's use of bond money in the building of a new high school. That letter was published by the newspaper.

Pickering wrote that the new track was not regulation distance despite the fact thousands of dollars had been spent on it. He criticized free lunches for high school

athletes, no doors on several classrooms, no sunlight in the plant room and no water in the first aid treatment room. The Supreme Court concluded:

> *The letter constituted, basically, an attack on the School Board's handling of the 1961 bond issue proposal and its subsequent allocation of financial resources between the schools educational and athletic programs.* It also charged the superintendent with attempting to prevent teachers in the district from opposing or criticizing the proposal bond issue. 391 U.S. at 566. (emphasis added).

This Court reversed the Board's dismissal of Marvin Pickering.

The *Pickering* case is directly on point with the facts in this case. Petitioner used a press release and a news conference to communicate with the public. Pickering wrote a letter to the newspaper and it was published. Bond levies had passed in both cases. The subject matter of the communications in both cases was the manner in which the public bond monies were being spent or going to be spent. This Court held Marvin Pickering's speech was of public concern and that he was entitled to First Amendment protection. Marvin Pickering did not raise criminal wrongdoing.

This Court's opinion in *Pickering* did not just deal with the rights of Marvin Pickering. It dealt with the public's interest in

> "having free and unhindered debate on matters of public importance—*the core value of the First Amendment*—" 391 U.S. at 573.
>
> *Teachers are, as a class, the members of a community most likely to have informed and definite opinion as to how funds allotted to the*

> *operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliation of dismissal.* 391 U.S. at 572. (emphasis added).

The Supreme Court concluded *free and open debate is vital to informed decision making by the electorate.* 391 U.S. at 571-572.

Amicus respectfully submits that if the holding of the Court of Appeals in this case were applied to Pickering's letter he would have lost for he did not expose criminal activity. But this Court had no problem holding the content of Pickering's letter was of public concern.

Public employees constitute a sizable portion of the work force in this nation. (1995 *Information Please Almanac*) Public employees are the very persons who know what is going on within government and how tax dollars are being spent. If those employees' First Amendment protection is limited to criminal whistle blowing communications, informed decision making by the electorate will be severely limited. The persons "most likely to have informed and definite opinion", 391 U.S. at 572, as to how public funds are allocated and spent will be silenced. The core value of the First Amendment, free and unhindered debate, will have been dealt a severe blow.

In *Connick v. Myers*, 461 U.S. 138, (1983), this Court exempted from the *Pickering* holding employee statements of a purely personal nature. This Court went on to hold:

> Whether an employee's speech addresses a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. 461 U.S. at 147-148.

Myers' actions concerning office policy dealt directly with the application of that policy to herself. This Court refused to constitutionalize an employee's personal grievance. That very limited holding should not now be used to turn every public comment by a public employee into a private grievance—unless it relates to criminal whistle blowing.

This Court in *Connick* was very careful to point out

> *We do not suggest, however, that Myers' speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment.* "The First Amendment does not protect speech and assembly only to the extent that it can be characterized as political. *'Great secular causes, with smaller ones, are guarded.'* " United Mine Workers v. Illinois State Bar Association, 389 U.S. 217, 223, 88 S.Ct. 353, 356, 19 L.Ed.2d 426 (1967), quoting Thomas v. Collins, 323 U.S. 516, 531, 65 S.Ct. 315, 323, 89 L.Ed. 430 (1945). We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the state can prohibit and punish such expression by all persons in its jurisdiction. See Chaplinsky v. New Hampshire, 315 U.S. 568, 62 S.Ct. 766, 86 L.Ed. 1031 (1942); Roth v. United States, 354 U.S. 476, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957); New York v. Ferber, ____ U.S. ____, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982). 461 U.S. at 147. (emphasis added).

In this case Petitioner joined with others to form the Committee to Maintain and Improve Drake Hospital. That Committee's cause, whether viewed as a "great" cause or a "smaller" cause, had the purpose of trying to maintain the hospital and improve care at the hospital. This was a cause worthy of First Amendment protection.

In *Connick* this Court held that content, form and context of the statement must be considered. Therefore, examination of the issues in this case cannot avoid the fact that Plaintiff chaired the Committee and that the Committee was composed not only of employees but also of patients, patients' family members and local citizens. The Committee prepared and issued the press release. This can hardly be characterized as a personal grievance as described in *Connick*. Whether it is viewed as a greater or smaller cause it falls directly under the criteria for protection set forth in *Connick*. This case is also certainly distinguishable from the holding in *Connick* in terms of form and context.

The content of the Petitioner's speech itself is of public concern. While media coverage may not, in and of itself, demonstrate public concern, *Amicus* submits it is highly unlikely there would be media coverage if the subject matter were not of public concern. How who calls the press conference or delivers the press releases can affect the *Connick* test is beyond *Amicus'* understanding.

As the dissent in the Circuit Court noted the subject of health care and how it is delivered may very well be *the* public issue of the '90's. What could be of more public concern than whether tax dollars are to be used to care for patients directly at a public hospital or indirectly at private facilities? This relates directly to the current hot topic of privatization of government operation.

If Petitioner is silenced on these issues, so will be the thousands of other public employees involved in health care, education, welfare and social service. Those areas are of public concern today. And all of us, the American public, will be the losers if the Court of Appeals' decision in this case is allowed to stand, for free and open

debate on health care and other publicly funded programs will be seriously impaired.

The effect of the decision in this case is to effectively silence public employees living in the Sixth Circuit. The public is the big loser for the public will be cut off from full and open debate on public issues based upon factual information given by those with first hand knowledge. This Court should not permit that to happen.

II. This Case Merits Review By This Court To Resolve The Difference In Holdings By Different Courts Of Appeals.

The Circuit Court's decision in this case differs with the law in other Circuits. The Court of Appeals for the Seventh Circuit has had occasion to apply the *Pickering* principles of law not only in *McLaughlin v. Tilendis*, 398 F.2d 287 (7th Cir. 1968), in which the right of public employees to associate with others for a cause was recognized, but also in numerous other cases.

In *Muller v. Conlisk*, 429 F.2d 901 (7th Cir. 1970), the Plaintiff, a policeman, criticized the police department's Internal Inspection Division (IID) on television saying:

> The IID is like a great big washing machine. Everything they put into it comes out clean. 429 F.2d at 902.

The Court of Appeals found those comments protected by the First Amendment to the United States Constitution.

And the Seventh Circuit Court of Appeals has continued to honor that precedent.

In *McGill v. Board of Ed. of Pekin Elementary Sch.*, 602 F.2d 774 (7th Cir. 1979), the Plaintiff, a teacher, had complained about school procedures and had discussed a

master collective bargaining agreement at school board meetings and with the faculty. The Court of Appeals found the Plaintiff's comments were of public concern.

In *Knapp v. Whitaker*, 759 F.2d 827 (7th Cir. 1985), the Plaintiff, a teacher, criticized the grievance procedures in the school district. Subsequently he lost a coaching assignment and was geographically transferred. The Court of Appeals held his speech was protected by the First Amendment.

In *Greenberg v. Kometko*, 811 F.2d 1057 (7th Cir. 1987), the plaintiff resigned from state employment at the Illinois Department of Children and Family Services after being transferred in retaliation for certain statements he had made in-house and to certain members of the public. Greenberg had attempted to inform his supervisors and certain members of the public that children's mental health, physical health and their very lives were being threatened. Greenberg said that in order to save money the Department was returning children to unfit families. The Court of Appeals characterized Greenberg's comments as "*designed to right injustices Greenberg saw in the handling of the office's primary responsibilities.*" 811 F.2d at 1062. (emphasis added). The Court of Appeals for the Seventh Circuit held Greenberg's comments were entitled to First Amendment protection.

Recognizing that First Amendment protection covered not only comments made to the public but also comments made internally on matters of public concern, *Givhan v. Western Lines Consolidated School District*, 439 U.S. 410 (1979), the Court of Appeals in *Greenberg* said:

> Those comments described in the record attempted to show, for example, that court orders were being ignored, that children were being denied essential health care, and that, in order to save

> expenses, children were being returned to unfit families. 811 F.2d at 1062.

The Court of Appeals held Greenberg was attempting to improve the care of children in Illinois' child care system. His comments were protected by the First Amendment.

The Circuit Court's holding in this case also directly conflicts with the decision of the Court of Appeals for the Second Circuit in *Rookard v. Health and Hospitals Corp.*, 710 F.2d 41 (2nd Cir. 1983). The Court of Appeals in *Rookard* held speech that dealt with waste of public monies was protected by the First Amendment.

Clearly neither the Court of Appeals for the Seventh Circuit nor the Court of Appeals for the Second Circuit has limited the First Amendment protection of public employees to criminal whistle blowing. But that is precisely what the Court of Appeals for the Sixth Circuit has done in this case. The chilling effect of the Court's ruling cannot be underestimated. Public employees in the Sixth Circuit will live in fear of discharge if they express *any opinion on any controversial subject* except criminal conduct. And *Amicus Curiae* submits that chilling effect will spill over into whistle blowing on criminal conduct. When in doubt as to whether the comments relate to criminal conduct, public employees in the Sixth Circuit will simply keep their mouths shut.

Amicus submits that public employees in Cincinnati, Detroit and Louisville must not have less rights under the First Amendment than public employees living in Chicago, Indianapolis, Hartford and New York City.

It is the particular province of this Court to insure that the rights guaranteed by the United States Constitution are uniform throughout the nation. This Court cannot allow this disparate treatment in the area of First Amendment rights to continue. First Amendment rights must be

accorded uniform protection. Therefore, this Court should grant the Petition to insure public employees have uniform First Amendment protection throughout the nation.

CONCLUSION

Amicus urges this Court to grant the Petition for Writ of Certiorari. The issue presented is not only of importance to public employees it is also of extreme importance to the nation's interest in full and open debate on public issues. *Amicus* further urges this Court to grant the Petition so as to end disparate treatment of public employees who live in different parts of the nation.

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